ARTICLES

THE FREEDOM OF INFORMATION ACT TRIAL

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This Article examines the paucity of Freedom of Information Act (FOIA) cases that go to trial and courts' preference for resolving these disputes at the summary judgment stage. Using traditional legal analysis and empirical evidence, this Article explores whether we should expect FOIA cases to go to trial and how the scarcity of FOIA trials compares to the trial rate in civil litigation generally. It concludes that the unusual use of summary judgment in FOIA cases has unjustifiably all but eliminated FOIA trials, which occur in less than 1% of FOIA cases. It further examines how conducting FOIA trials in appropriate cases might increase the frequency of pro-transparency case outcomes as intended under the Act, using both empirical analysis and qualitative conclusions from interviews with attorneys who have litigated FOIA trials.

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> *The very word "secrecy" is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it.*
>
> –John F. Kennedy[1]

INTRODUCTION

Not since the days of Watergate intrigue has government secrecy been as widely discussed as it is today. President George W. Bush's Administration built a notorious record of ratcheting back information disclosure and increasing the amount of government operations conducted without public oversight.[2] Amid the secret prisons,[3] covered-up torture in Guantanamo,[4] and missing weapons of mass destruction,[5] the American public's primary statutory tool for

1. President John F. Kennedy, The President and the Press: Address Before the American Newspaper Publishers Association (Apr. 27, 1961), *available at* http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches/The-President-and-the-Press-Address-before-the-American-Newspaper-Publishers-Association.aspx.

2. *See* MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 108TH CONG., SECRECY IN THE BUSH ADMINISTRATION 1–2 (Comm. Print 2004) [hereinafter WAXMAN REPORT].

3. *See* Jeannie Shawl, *Bush Confirms Existence of Secret CIA Prisons for High-Value Terror Detainees*, JURIST (Sept. 6, 2006, 2:09 PM), http://jurist.law.pitt.edu/paperchase/2006/09/bush-confirms-existence-of-secret-cia.php.

4. *See* William Glaberson, *Torture Acknowledgement Highlights Detainee Issue*, N.Y. TIMES, Jan. 14, 2009, at A21.

5. *See Report: No WMD Stockpiles in Iraq*, CNN.COM (Oct. 7, 2004, 10:50 AM),

discovering governmental misconduct—the Freedom of Information Act[6] (FOIA)—was also severely threatened. According to one congressional report, "[t]he Bush Administration has taken a series of actions to undermine, and in some instances reverse, the principle that the public has a right to government information under FOIA."[7]

President Barack Obama's Day One memoranda on FOIA[8] and transparency,[9] therefore, came as a welcome relief to advocates for government accountability. Proclaiming that "[i]n the face of doubt, openness prevails,"[10] President Obama laid out a vision of transparency that he hoped would "strengthen our democracy" and "promote[] accountability."[11] Central to President Obama's promise was a shift toward more affirmative disclosure of government information.[12] Affirmative disclosure—that is, the release of information without waiting for a request from the public[13]—is an increasingly common demand among transparency advocates. As seasoned FOIA litigator David C. Vladeck has argued, the Internet has in many ways "made obsolete the request-and-wait-for-a-response approach designed for paper records."[14]

The steps President Obama has taken to implement his transparency policy demonstrate that affirmative disclosure has indeed been his central focus. Examples of the administration's efforts to distance itself from the Bush years of secrecy by increasing affirmative disclosure include the rollout of Data.gov and Recovery.gov, which were designed to give the public a central location in which to find government-held data systems[15] and

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http://www.cnn.com/2004/WORLD/meast/10/06/iraq.wmd.report/.

6. 5 U.S.C. § 552 (2006).

7. WAXMAN REPORT, *supra* note 2, at 3.

8. Memorandum on Freedom of Info. Act from the President to the Heads of Exec. Dep'ts & Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter Obama FOIA Memorandum].

9. Memorandum on Transparency and Open Gov't from the President to the Heads of Exec. Dep'ts & Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009) [hereinafter Obama Transparency Memorandum].

10. Obama FOIA Memorandum, 74 Fed. Reg. at 4683.

11. Obama Transparency Memorandum, 74 Fed. Reg. at 4685.

12. *See id.* (proclaiming the Obama administration will "disclose information rapidly").

13. K. Lloyd Billingsley, *A Case of Affirmative Disclosure for California Public Pensions*, S.F. EXAMINER, June 19, 2011, http://www.sfexaminer.com/opinion/op-eds/2011/06/case-affirmative-disclosure-california-public-pensions.

14. David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1793 (2008).

15. *See* DATA.GOV, www.data.gov/about (last visited Nov. 14, 2011) ("The purpose of Data.gov is to increase public access to high value, machine readable datasets generated by the Executive Branch of the Federal Government.").

information about how the economic stimulus money was spent,[16] and Office of Management and Budget Director Peter Orszag's order to all agencies to identify "high value data sets" to be published online.[17]

Despite undeniable improvements in formal transparency policy, the Obama Administration has come under fire for taking positions in conflict with the President's stated goal of openness. The Obama Administration has, for instance, refused to release seemingly innocuous records on several occasions, including the Federal Aviation Administration's withholding of bird-strike data immediately following a plane's dramatic water landing in the Hudson River because of bird strikes to the engines[18] and the General Services Administration's withholding of the complete list of .gov domain names owned by the government.[19] Even more controversial topics have prompted the administration to seek additional legislative protection for categories of records, such as the terrorist watch list, despite criticism that individuals wrongly included on the list would not be able to challenge their status,[20] and photos documenting abuse of terrorism suspects in U.S. custody, despite the public's interest in knowing of illegal governmental conduct.[21] An Associated Press report found that the use of almost every one of FOIA's exemptions to disclosure rose during President Obama's first year in office.[22] As to FOIA litigation, in implementing the presidential memoranda, Attorney General Eric Holder did not mandate any case-by-case review of pending litigation.[23] Additionally, in FOIA litigators'

16. *See* RECOVERY.GOV, www.recovery.gov/About/Pages/About.aspx (last visited Nov. 14, 2011) ("Recovery.gov is the U.S. government's official website that provides easy access to data related to Recovery Act spending and allows for the reporting of potential fraud, waste, and abuse.").

17. Memorandum on Open Gov't Directive from Peter Orszag, Dir., Office of Mgmt. & Budget, to the Heads of the Exec. Dep'ts & Agencies (Dec. 8, 2009), *available at* www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf (specifying that agencies should identify three such data sets within forty-five days and setting additional long-term goals).

18. Michael J. Sniffen, *Bird-Strike Data is Cloaked in Secrecy*, TRENTON TIMES, Mar. 28, 2009, at A1.

19. Thomas Claburn, *Government Keeping Its .Gov Domain Names Secret: Despite a Presidential Promise of Openness in Government, GSA Officials Decline to Release the Full List for Fear of Cyberattack*, INFORMATIONWEEK (Mar. 2, 2009, 5:40 PM), http://www.informationweek.com/news/government/policy/215600330.

20. Ellen Nakashima, *Administration Seeks to Keep Terror Watch-List Data Secret*, WASH. POST, Sept. 6, 2009, at A4.

21. Editorial, *Still Too Many Secrets: The Obama Administration Promises More Open Government—Sometimes*, WASH. POST, June 1, 2009, at A14.

22. Sharon Theimer, *Promises, Promises: Is Gov't More Open with Obama?*, BLOOMBERG BUSINESSWEEK, Mar. 16, 2010, http://www.businessweek.com/ap/financialnews/D9EFOS1O0.htm.

23. *See Advancing Freedom of Information in the New Era of Responsibility: Hearing*

experience, the Justice Department's litigation positions were not perceptibly changed after the Obama transparency policies were announced.[24]

Even if the Obama Administration were achieving greater openness than its predecessors, disappointments should not come as a surprise. No matter how idealistic the governors, there will always be a need for the public to hold its government accountable and to demand honesty and transparency. Public oversight is necessary whenever the government shows reluctance to reveal its operations, whether those are few or many. Accordingly, the public cannot rely solely on the increasingly popular affirmative disclosure mechanisms to meet its needs for government information.

FOIA gives a statutory right to any person to request and receive government records,[25] subject to nine enumerated exemptions,[26] and FOIA uses a request-and-response model, rather than affirmative disclosure, as its primary disclosure mechanism.[27] But as the *New York Times* recently noted, "[a]gencies sometimes do not take a [FOIA] case seriously until the requester takes the government to court."[28] Because bringing a FOIA case in federal court is the primary legal tool to challenge the government's right to keep secret its operations, the robustness of our democracy rests, at least in part, on the robustness of the FOIA litigation process itself.[29]

Yet, as this Article demonstrates, FOIA litigation is anything but

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Before the S. Comm. on the Judiciary, 110th Cong. 4 (2009) (statement of Meredith Fuchs, General Counsel, Nat'l Sec. Archive). In contrast, Attorney General Janet Reno, in implementing President William J. Clinton's FOIA policies, did order individualized review of pending FOIA litigation. *Id.* at 5.

24. *See* Michael J. Sniffen, *Secrecy is Still Order of the Day at Justice*, ST. LOUIS POST-DISPATCH, Feb. 17, 2009, at A1 (reporting that the Justice Department under President Obama chose to defend the Bush Administration's decision to not release documents on "domestic wiretapping, data collection on travelers and U.S. citizens, and interrogation of suspected terrorists").

25. *See* Vladeck, *supra* note 14, at 1787 ("FOIA gives any person a right to obtain, simply by asking for it, any record in the possession and control of a federal agency, government corporation, or other federal entity . . . ." (footnotes omitted) (internal quotation marks omitted)).

26. 5 U.S.C. § 552(b)(1)–(9) (2006); *see infra* text accompanying note 31 (listing the nine exemptions).

27. *See* Vladeck, *supra* note 14, at 1797 (describing the request-and-response process as "[t]he real genius of FOIA").

28. Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth About Detainees and Interrogations*, N.Y. TIMES, Aug. 30, 2009, at A4.

29. *Cf.* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171–72 (2004) ("FOIA is often explained as a means for citizens to 'know what their Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (internal quotation marks omitted))).

thriving. One day, while attending a regular meeting of FOIA litigators, a number of us went around the small conference table, each reporting on any interesting FOIA litigation issues that had arisen in our practices. The first person discussed a recent attorneys' fees decision, the second discussed an unusual invocation of an exemption, and then someone began by stating "I have a FOIA trial scheduled in December." Everyone looked up, and note-taking ceased. "A FOIA trial?" someone asked incredulously. I asked, "You mean, as a formality? There is a trial date scheduled, but it won't really happen, right?" The answer: "No, both parties' motions for summary judgment were denied. There is going to be a trial." Although we were a room full of FOIA litigators, no one had ever had a FOIA trial, seen a FOIA trial, or could remember hearing about a FOIA trial. As this anecdote suggests and this Article shows, it is extremely unusual for a FOIA case to go to trial. Rather, FOIA cases that are resolved in litigation, versus settlement, are predominantly resolved as a matter of law on a motion for summary judgment.

This Article explores the lack of FOIA trials on the federal judicial docket. Part I provides an overview of FOIA, including the rights of the public and the process for litigating a request denial. Part II explores the theoretical framework our legal system uses to distinguish a question of law from a question of fact. It then examines the types of questions that frequently arise in FOIA litigation and argues that many of those questions are appropriately categorized as questions of fact traditionally resolved at trial. Using empirical evidence from the Federal Judicial Center's integrated database, as well as traditional legal analysis, Part III demonstrates that in the FOIA context, questions of fact are routinely treated as questions of law and resolved by courts on summary judgment motions, all but eliminating trials under FOIA. Part IV discusses the potential of FOIA trials to promote outcomes that realize FOIA's goal of maximum disclosure, highlighting interviews with attorneys who have litigated some of the rare FOIA trials. This Article concludes with proposed litigation strategies to increase trial adjudications in FOIA cases.

I. WHAT IS FOIA?

FOIA is a powerful legal tool. This statute gives anyone the right to request federal agency records and requires agencies to release them unless they fall within one of the nine exempt categories.[30] The

30. *See* 5 U.S.C. § 552(a) (applying only to agencies of the executive branch, not

exemptions to disclosure include classified records, internal agency records related solely to personnel rules and policies, records exempted by other statutes, records that contain trade secrets and confidential commercial information, records that are privileged in litigation, certain records that implicate personal privacy, certain law enforcement records, and certain records that concern banking and oil regulation.[31] The purpose of the request and the identity of the requester make no difference in assessing the requester's entitlement to the records.[32] Anyone can request any records for any reason.[33]

The agency's obligation, on receipt of a request, is to perform a search for responsive records that is reasonably calculated to uncover any such records in its possession.[34] The agency must then provide a response to the requester within twenty business days.[35] If the agency decides to withhold a record under an exemption to disclosure, it must identify the exemption that it claims applies.[36] It must also provide records in the format the requester wants, including searchable electronic form, if feasible.[37] On the other hand, agencies are entitled to charge a requester a fee to recover some of the costs of

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the legislative or judicial branches). The President is not an "agency" subject to FOIA. Armstrong v. Exec. Office of the President, 1 F.3d 1274, 1280 (D.C. Cir. 1993) (per curiam). Presidential records are treated separately under the Presidential Records Act of 1978. 44 U.S.C. §§ 2201–07 (2006).

31. 5 U.S.C. § 552(b)(1)–(9). For thirty years, predominantly internal records, the release of which would risk circumvention of the law, were considered included within exemption 2 in many circuits. *See, e.g.*, Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981). The Supreme Court recently eliminated that basis for withholding as not grounded in the statutory text. *See* Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1271 (2011) (rejecting *Crooker*).

32. *See Reporters Comm.*, 489 U.S. at 775 (explaining that if a record is able to be released as to one requester, it must be released as to all). The identity of the requester matters only when the requester seeks records concerning himself or authorizes the release of such records to another and thereby waives any exemption protecting that individual's privacy. *See* Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1116 (D.C. Cir. 2007).

33. Prior to FOIA, there was a right to public information contained in the Administrative Procedure Act (APA), but it only provided a right to access records for persons who could demonstrate that they had a legitimate interest in the records. Vladeck, *supra* note 14, at 1975 n.50. FOIA was enacted to revoke this requirement and broaden access to government records. H.R. REP. NO. 89-1497, at 22 (1966); S. REP. NO. 89-813, at 38–40 (1965).

34. *See* Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) ("There is no requirement that an agency search every record system. However, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." (citations omitted)).

35. 5 U.S.C. § 552(a)(6)(A)(i).

36. *Id.* § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record . . . .").

37. *Id.* § 552(a)(3)(B).

processing the FOIA request, including the costs of personnel time performing the search, the duplication of the records, and the personnel time reviewing the records for exempt material.[38] The types of costs an agency can charge vary depending on the requester's eligibility for inclusion in certain categories, such as news media or commercial requesters.[39] In addition to some categories of requesters entitled to reduced fees, FOIA provides that any requester who demonstrates the request is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester" is entitled to a waiver of otherwise applicable fees.[40] Finally, requesters are entitled to expedited processing of their requests in certain circumstances.[41]

Disputes arise when requesters are dissatisfied with an agency's response, whether because of the agency's inadequate search for records, the agency's withholding some or all of the records, the fees charged by the agency, or the agency's determination that the request is not entitled to expedited processing.[42] Disputes also arise when the agency fails to respond within the deadline.[43] This last type of dispute is not uncommon; some agencies report that, on average, it takes hundreds of days to respond to FOIA requests.[44]

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38. *Id.* § 552(a)(4)(A).

39. FOIA provides that an agency may assess search, duplication, and review fees for commercial use requesters; duplication fees for educational and scientific institutions and representatives of the news media; and search and duplication fees for all other requesters. *Id.*

40. *Id.* § 552(a)(4)(A)(iii).

41. *Id.* § 552(a)(6)(E). Under the statute, requesters are entitled to expedited processing when they demonstrate a "compelling need" for the requested records, which is defined as:

> (I) that a failure to obtain the requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
>
> (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

Id. § 552(a)(6)(E)(v). In addition, the statute authorizes agencies to promulgate regulations enumerating any additional circumstances the agencies deem worthy of expedited processing. *Id.* § 552(a)(6)(E)(i)(II).

42. *See, e.g.*, Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 858 (D.C. Cir. 1980) (illustrating a dispute over whether the Department of Energy was correct in withholding documents under FOIA exemptions 5 and 7).

43. *E.g.*, Info. Network for Responsible Mining v. Bureau of Land Mgmt., 611 F. Supp. 2d 1178, 1182 (D. Colo. 2009) (considering a lawsuit brought as a result of the Bureau of Land Management's failure to respond to a FOIA request for more than three months, well exceeding the deadline of twenty business days).

44. SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2010, OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE 10–11, http://www.justice.gov/oip/foiapost/fy2010-ar-summary.pdf (last visited Nov. 14, 2011). For processing and reporting purposes,

Requesters have the right to administratively appeal an agency decision under FOIA and, once administrative remedies are exhausted, file a lawsuit in federal district court to challenge the agency's decision.[45] If an agency misses the twenty-business-day deadline for responding to a FOIA request, a requester may sue immediately, because the failure to respond constitutes a constructive denial of the request that need not be exhausted by administrative appeal.[46] Alternatively, if an agency responds but the requester is not satisfied with the response, the requester must first administratively appeal the decision to an appeals office within the agency.[47] Once an appeal is filed, the appeals office again has only twenty business days to respond.[48] If the appeal is denied or the time limit runs without a decision, the requester is deemed to have exhausted all administrative remedies and may then file a lawsuit challenging the agency's actions under FOIA.[49]

Once in court, the requester must show only that she complied with the proper procedures; the burden is then on the agency to justify its withholding of responsive records.[50] The requester bears the burden of proof only when challenging the denial of a fee waiver or expedited processing.[51] In either case, judicial review of agency

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"simple" and "complex" requests are treated separately. *Id.* at 10. Even for simple requests, some agency response times are quite lengthy. For instance, in 2010, for simple requests, the Department of 'Housing and Urban Development's average processing time was 312 days, and the Legal Services Corporation's was 156 days. *Id.* at 10–11. For complex requests, the median number of days ranged from below the 20-day time limit to as high as 1716 days. *Id.* at 11.

45. There is a third venue for resolving FOIA disputes created by the OPEN Government Act of 2007 § 10, Pub. L. No. 110-175, 121 Stat. 2524, 2529, namely the Office of Government Information Services (OGIS). 5 U.S.C. § 552(h) (Supp. III 2008). OGIS is similar to an ombudsman office for FOIA, providing not only guidance to agencies and oversight of agency performance under FOIA, but also less formal dispute resolution services between requesters and agencies. *Office of Government Information Services (OGIS): Resolving Federal FOIA Disputes*, NAT'L ARCHIVES, http://www.archives.gov/ogis/ (last visited Oct. 29, 2011). For budgetary reasons, the office was not actually opened until September 2009, *id.*, and it is too soon to tell whether OGIS will provide a realistic third avenue for dispute resolution for requesters.

46. *See* 5 U.S.C. § 552(a)(6)(C)(i) (explaining that a requester is deemed to have exhausted his administrative remedies when the agency fails to comply with the deadlines for responding to a request); *see also id.* § 552(a)(4)(B) (granting jurisdiction to the federal district court to enjoin an agency to produce withheld records).

47. *Id.* § 552(a)(6)(A)(i).

48. *Id.* § 552(a)(6)(A)(ii).

49. *Id.* § 552(a)(4)(B); *id.* § 552(a)(6)(C)(i).

50. *Id.* § 552(a)(4)(B).

51. *See* Al-Fayed v. CIA, 254 F.3d 300, 301, 309 (D.C. Cir. 2001) (expedited processing); Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam) (fee waiver).

actions under FOIA is de novo;[52] therefore, theoretically, no deference is given to the agency's decision. If the agency loses, the requester can be awarded costs and attorneys' fees to be paid by the agency.[53]

The public makes good use of FOIA. In fiscal year 2010, 597,415 requests for records were made to federal government agencies and departments.[54] The highest numbers of requests went to the Departments of Homeland Security, Defense, Health and Human Services, and Justice.[55] The government, however, also makes frequent use of the exemptions to disclosure. In that same year, government agencies processed 407,283 FOIA requests to determine the applicability of the exemptions and eventually denied, in full or in part, 44% of those requests.[56] Despite the high volume of requests and denials,[57] only a small percentage of denials are appealed or litigated. For example, in 2010 there were 10,948 administrative appeals,[58] while the number of FOIA cases filed in federal court

52. 5 U.S.C. § 552(a)(4)(B) (establishing de novo review for withholding of records); *Al-Fayed*, 254 F.3d at 305 (holding that the court reviews expedited processing decisions de novo); *Larson*, 843 F.2d at 1483 ("[T]he standard of review [for fee waiver determinations is] de novo."). There is some debate about whether fee category determinations, such as whether a requester is a representative of the news media (as opposed to public interest fee waiver determinations), are reviewed de novo or for abuse of discretion, but a majority of recent decisions have reviewed those determinations de novo. *Compare* Ctr. for Pub. Integrity v. U.S. Dep't of Health & Human Servs., No. 06-1818, 2007 WL 2248071, at *3–4 (D.D.C. Aug. 3, 2007) (de novo), *and* Elec. Privacy Info. Ctr. v. Dep't of Def., 241 F. Supp. 2d 5, 9 (D.D.C. 2003) (de novo), *and* Judicial Watch, Inc. v. U.S. Dep't of Justice, 185 F. Supp. 2d 54, 59 (D.D.C. 2002) (de novo), *with* Judicial Watch, Inc. v. U.S. Dep't of Justice, 122 F. Supp. 2d 5, 11–12 (D.D.C. 2000) (holding that the proper standard of review is arbitrary and capricious).

53. *See* 5 U.S.C. § 552(a)(4)(E) (allowing an award of attorneys' fees to plaintiffs who "substantially prevailed"). Prior to the OPEN Government Act of 2007, "substantially prevailed" was not statutorily defined. After the Supreme Court decided *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), federal courts began to limit plaintiffs' ability to recover attorneys fees in cases where the government released records after having been sued but prior to a judicial determination of entitlement to relief. *See* Union of Needletrades, Indus. & Textile Emps. v. INS, 336 F.3d 200, 203 (2d Cir. 2003) (applying *Buckhannon* to deny attorneys' fees); Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy, 288 F.3d 452, 456–57 (D.C. Cir. 2002) (same). The OPEN Government Act of 2007 amended FOIA to define "substantially prevailed" to include "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial," effectively overruling *Buckhannon* in the FOIA context. 5 U.S.C. § 552(a)(4)(E) (Supp. III 2008).

54. SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2010, *supra* note 44.

55. *Id.* at 11.

56. *Id.* at 4.

57. Non-denial disputes are much less common. For example, in 2010, agencies and departments processed only 6072 requests for expedited processing, in comparison with 600,849 total FOIA requests processed. *Id.* at 4, 10.

58. *Id.* at 13.

ranges from 300 to 500 per year.[59]

What happens each year in those 300 to 500 litigated FOIA cases is critical. Records of great public interest are handed over or ordered released and, perhaps most importantly, judicial decisions guide future agency determinations about whether records are exempt from disclosure. As a result, the impact of a single litigated FOIA case can reach far beyond the records at issue in that dispute.

II. FOIA FACTS

It is not immediately apparent why FOIA cases involve factual disputes. Litigation over the government's claim that requested records are exempt from disclosure, the classic FOIA case, sounds straightforward: the records are what they are, and they either fall within one of the exemptions or they do not. At worst, one might assume a court can determine the correct outcome once it has examined the records in camera, which it is entitled to do by statute.[60]

This assumption is incorrect. The content of the record itself may not be subject to factual disagreement, but it may be subject to competing interpretations. Moreover, the content of the record alone rarely resolves whether an exemption to disclosure applies. The scope of an exemption often depends on the circumstances surrounding the record's creation, the manner in which the record was used, or whether release of the record might cause a particular type of harm. As a result, although some FOIA disputes may involve only legal questions, a substantial number likely center on factual disputes. Properly categorizing questions that arise in FOIA cases as legal or factual, however, requires an understanding of how our legal system distinguishes questions of fact from questions of law.

A. "Fact" and "Law"

The difference between legal questions and factual questions is

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59. See FED. JUDICIAL CTR., *Federal Court Cases: Integrated Databases* (1979–2008), which can be obtained from the Inter-University Consortium for Political and Social Research at http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/72/studies?archive=ICPSR&q=federal+judicial+center+integrated+database&paging.startRow=1. After downloading only the civil terminations subsets for the individual years from 2001 to 2008 (study numbers 3415; 4059; 4026; 4348; 4382; 4685; 22,300; and 25,002) and the civil terminations subset for the combined period of 1970 to 2000 (study number 8429), I combined the information into a single database. I then converted the files for use in the statistical software Stata, thereby generating the data described in this Article. When referring to and citing this material below, I use the shorthand "FJC Database." The Stata files used for this analysis, along with instructions, are available upon request from the author and are also on file with the *Law Review*.

60. 5 U.S.C. § 552(a)(4)(B) (2006).

often presumed to be self-evident.[61] However, this seemingly simple distinction requires complex analysis when actually applied, as is true in many areas of law.[62] In one opinion, the Supreme Court had a moment of candor when it stated, "[w]e acknowledge that the Court has not charted an entirely clear course in this area,"[63] and in another, the Court declared the distinction between law and fact "vexing."[64]

Despite this latent complexity, understanding the nuanced approach necessary to categorize questions as "law" or "fact" is imperative because the ramifications of the categorization are of great importance. Questions of law are typically decided by motion; the court considers legal briefs submitted by each party and sometimes oral arguments presented by their lawyers.[65] In

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61. *See* Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1303 (1942) ("Beginning law students are asked to brief cases by separating the facts from the law—their teachers act as though the distinction were obvious even to the inexperienced.").

62. As Clarence Morris explained, the assumption that law and fact are always obviously distinct "is unwarranted and blinding." *Id.* Much like the seemingly self-evident yet ultimately complex distinction between "substance" and "procedure" necessary to determine whether state or federal law applies in diversity cases brought in federal court under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the law/fact distinction is deceptively complex. Indeed, a debate has evolved concerning the nature of the distinction itself. At one end of the spectrum, there are those who claim the distinction between law and fact is "purely a creature of convention," Gary Lawson, *Proving the Law: Not Proven*, 86 NW. U. L. REV. 859, 863 (1992), or constitutes a "myth," Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003). On the other end, many people argue there are true analytic differences between the categories. *See, e.g.*, Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 917 (1992). Rather than attempting to chart a new course in the debate over whether law and fact are ontologically distinct concepts or fictions of the law, this Article outlines how these two categories are typically applied by courts so as to examine FOIA disputes against that backdrop.

63. Miller v. Fenton, 474 U.S. 104, 113 (1985). In *Miller*, the Court held that the voluntariness of a confession is a legal question subject to de novo review. *Id.*

64. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). In *Pullman*, the Court held that whether evidence demonstrates an intent to discriminate is a factual question, rather than a legal question. *Id.* at 278–88. Even today, the Supreme Court is still confronted with questions of whether a particular dispute is a question of law or question of fact in varying contexts. Recently, for example, the Court has received several petitions for certiorari asking it to decide if the question whether speech is within a government employee's job duties is a question of law for the court to decide on summary judgment or a motion to dismiss, or whether it is a question of fact for the jury. *See* Petition for Writ of Certiorari at i, York v. Robinson, 130 S. Ct. 1047 (2010) (mem.) (No. 08-1462) (seeking a decision on whether a public employee is speaking pursuant to official duties is a question of law or a mixed question of law and fact); Petition for Writ of Certiorari at i, Cooley v. Eng, 130 S. Ct. 1047 (2010) (mem.) (No. 08-1571) (same); Petition for Writ of Certiorari at i, City of Maywood v. Densmore, 130 S. Ct. 52 (2009) (mem.) (No. 08-1082) (same). In all three cases, the Court denied the petitions for certiorari.

65. *See, e.g.*, FED R. CIV. P. 12(b)(1)–(7) (enumerating types of motions to dismiss); FED R. CIV. P. 50(a)(1) (allowing a court to grant a motion for judgment as

comparison, factual inquiries are determined at trial, with all of the accompanying courtroom drama embodied in evidentiary presentation: witness testimony, cross-examination, credibility attacks, weighing of witness demeanor, and appeals to sympathy and justice.[66] Moreover, identification of an issue as law or fact dictates the appropriate standard of appellate review, with conclusions of law reviewed de novo and findings of fact reviewed deferentially.[67] Such review allows appellate courts to revisit factual findings only if they are clearly erroneous.[68] Therefore, the consequences of miscategorization may deprive parties the ability to fully present their cases.

In an early examination of the difference between questions of fact and questions of law, James Bradley Thayer explained that facts involve not just "tangible, or visible" things; rather, they encompass "[a]ll inquiries into the truth, the reality, the actuality of things."[69] For the most part, modern scholars agree with Thayer. Quintessential questions of fact are generally considered to be about what happened, a layperson's description of events that "exist in the world that lies beyond the law."[70] As U.S. Court of Appeals Judge Richard Posner stated, "[s]omething happened, and it is the job of the court to find out what."[71] These questions are also referred to as "historical facts."[72] They are "fairly easy to identify" and include the

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a matter of law where the evidence is legally insufficient); FED. R. CIV. P. 56 (providing for summary judgment when the movant "is entitled to judgment as a matter of law").

66. *See* Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 104 (2005) (describing the fact finder's role in assessing testimony heard first-hand, including "the eye-twitches, sweaty brows, pregnant pauses and other non-verbal cues"). Certainly, one understanding of the division of labor between judges and juries is that judges decide questions of law, and juries decide questions of fact. James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 141, 141 (1890). Of course, not all trials are jury trials, *see* FED. R. CIV. P. 39, and bench trials involve the same types of evidentiary proffers as jury trials.

67. Warner, *supra*, note 66, at 103 (declaring that "[t]he whole reason for labeling a question 'law,' 'fact,' or 'mixed' is to determine the standard of review on appeal"); *see also* Pierce v. Underwood, 487 U.S. 552, 557 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."). The Constitution itself recognizes the review dimension: the Seventh Amendment proclaims that "no fact tried by a jury, shall be otherwise reexamined." U.S. CONST. amend. VII.

68. FED. R. CIV. P. 56(a)(6) (setting out the clearly erroneous standard for findings of fact made by the court).

69. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 185, 191 (1898).

70. Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487, 487 (1986).

71. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 203 (1993).

72. Warner, *supra* note 66, at 115 (internal quotation marks omitted).

"who, what, when, where, and how of every legal dispute."[73] For example, "who was driving the red car when it crashed into the blue car?" or "for how long did Mary leave the baby in the house alone?" Historical facts also include a person's past subjective state of mind, such as knowledge, intent, and good faith.[74]

In addition to "historical facts," another relatively straightforward category of factual questions is "predictive facts," which require the fact finder to predict either actual or hypothetical future reality.[75] These types of questions include whether and how much economic injury the plaintiff is likely to suffer in the future or what profits a plaintiff might have made but for the defendant's conduct.[76] Questions of predictive fact are also consistently treated as factual questions by courts.[77]

By contrast, a question of law is "a rule or standard which it is the duty of a judicial tribunal to apply and enforce."[78] In Thayer's view, questions of law include an array of subsidiary questions about the rule or standard: whether a rule applies, its scope and meaning, its interaction with other rules, and whether the rule itself is valid.[79] Quintessential questions of law are questions such as "can a sixteen year old enter into a valid contract?" or "how many witnesses are needed to create an enforceable will?" These questions are the most general type of questions and state rules that are applicable to society at large, not only to the parties before the court in a given case.[80] "The important point about law is that it yields a proposition that is *general* in character."[81]

The examples above represent the types of questions that are the most easily categorized. But not all questions are so clear-cut. For instance, is "did Mary act negligently?" a question of law or a question

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73. *Id.*

74. *Id.* at 117; *e.g.*, Pullman-Standard v. United Steelworkers of Am., 456 U.S. 273, 288 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace.").

75. Warner, *supra* note 66, at 117–18; *see* Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 437 (2001) ("'Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury.'" (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia J., dissenting) (citation omitted))).

76. Warner, *supra* note 66, at 117–18.

77. *Id.*

78. THAYER, *supra* note 69, at 192.

79. *Id.* at 193.

80. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985) ("Law declaration involves formulating a proposition [that] affects not only the [immediate] case . . . but all others that fall within its terms." (citations omitted) (internal quotation marks omitted)).

81. *Id.*

of fact? On the one hand, negligence is a legal standard; on the other hand, how Mary acted is a factual matter. Thayer recognized this grey area of questions as "neither of law nor of fact," which include "the application of law to fact."[82] Thayer coins the term "ultimate facts" to describe the secondary inferences from the raw facts in a case.[83] Today, those questions are identified as "mixed questions" of law and fact.[84] Negligence is the classic example of this type of "mixed" question.[85]

Arguing that the "application of law to fact" is too amorphous a definition of "mixed question," Judge Randall H. Warner divides "mixed questions" into three categories: "evaluative determinations," "definition applications," and "compound questions."[86] These categories are useful in analyzing the types of questions that arise in FOIA cases. First, a mixed question is an "evaluative determination" when it requires the decision-maker to exercise judgment.[87] Warner identifies these types of questions as including negligence, probable cause, reasonableness, and proximate causation.[88] The evaluative determination is based on undisputed or already found facts about what happened,[89] but it must be made in each case as a judgment call.

Second, a question can be mixed when it requires a "definition application," and the definition is not susceptible to a bright-line rule.[90] For instance, if a certain remedy is available only to people who suffer severe injury, it is not possible for a court to determine a bright-line rule defining what type of injury is severe; rather, the decision-maker will have to apply prior holdings that determined the meaning of "severe" to each new situation.[91] Alternatively, if a remedy is only available for a victim's blood relatives, a court can make a

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82. THAYER, *supra* note 69, at 193; *see* Monaghan, *supra* note 80, at 236 ("[I]n contrast to the generalizing feature of law declaration, law application is situation-specific; any ad hoc norm elaboration is, in theory, like a ticket good for a specific trip only.").

83. THAYER, *supra* note 69, at 194.

84. Warner, *supra* note 66, at 129.

85. *Id.* *But see* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927) (arguing that questions of law and fact "are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter," for "[m]atters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law").

86. Warner, *supra* note 66, at 129.

87. *Id.* at 120.

88. *Id.*

89. *See infra* notes 95–97 and accompanying text (explaining that if the facts are disputed and are not already found, and the same decision-maker must find the underlying historical facts and then make an evaluative determination, those two steps form a compound question).

90. Warner, *supra* note 66, at 123–24, 132–33.

91. *Id.* at 123.

bright-line rule for what constitutes a blood relative and then apply that definition "mechanically."[92] Accordingly, whether a remedy is available under the blood-relative standard would be a pure question of law because underlying facts would rarely be in dispute.

The third type of mixed question is a compound question, which contains multiple sub-issues of different categories, including questions of fact, questions of law, evaluative determinations, and/or definition applications.[93] For example, whether an event was proximately caused by an act is a compound question: first, the decision-maker must determine exactly how the plaintiff was injured in relation to the defendant's conduct (a pure question of historical fact), then the decision-maker must determine if the relationship between the plaintiff's injury and the defendant's conduct was sufficiently foreseeable for a finding of proximate cause (an evaluative determination).[94]

The question therefore remains: how are mixed questions treated? As a preliminary matter, mixed questions are not simply treated as questions of law for a court to decide and an appellate court to review de novo.[95] As Judge Warner describes, compound questions are properly parsed into their sub-parts, and each part should be allocated to a decision-making process and given an appropriate standard of review.[96] Most often, these compound questions will have a compound standard of review; that is, factual findings about the parties' conduct or other historical facts are reviewed for clear error, and the conclusions are either given some amount of deference or are reviewed de novo, depending on their character, as described below.[97]

With respect to both definition applications and evaluative

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92. *Id.*; *see also* Monaghan, *supra* note 80, at 236 ("If all legal propositions could be formulated in great detail, this function would be rather mechanical and require no distinctive consideration. But such is not the case. Linking the rule to the conduct is a complex psychological process, one that often involves judgment.").

93. Warner, *supra* note 66, at 136.

94. *Cf. id.* (explaining that a negligence case overall would be a compound question because it requires the fact finder to "determine both what happened and whether, in light of the facts it found, the defendant exercised reasonable care"). The same could be true for a definition application: the decision-maker may first need to find the historical facts of the case and then determine if the definition applies.

95. *Cf.* Monaghan, *supra* note 80, at 238 (noting the Supreme Court has not held "that all questions of law application should be assimilated to law declaration").

96. *See* Warner, *supra* note 66, at 136–37 (highlighting the problems that arise when various sub-issues that make up a compound question are not separated from one another).

97. *See id.* at 140 (citing Maynard v. Nygren, 332 F.3d 462 (7th Cir. 2003) (illustrating the proper handling of a compound question on review)).

determinations, the allocation of decision-making authority and standard of review is not rigid.[98] Typically, a true definition application to the facts of a particular case is bound up in the case, not useful as precedent, and best decided by the fact finder such that it is truly factual in nature and should be reviewed deferentially.[99] When a definition application question is reviewed de novo, most often it is because the question was not actually a definition application, but rather a reformulation of the definition in more general terms that will apply generally to similar cases, thereby acting as a question of law.[100]

The treatment of evaluative determinations is much more varied. Evaluative determinations may be treated either as fact or as law and reviewed under either standard, typically determined solely by policy considerations about who is the best decision-maker for a particular type of decision,[101] including the "institutional competence of trial judges and appellate judges."[102] As such, evaluative determinations are not presumed to be treated as one type of question or the other, but are categorized on a case-by-case basis.

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98. Monaghan, *supra* note 80, at 237. As to a subset of decisions about how to categorize questions as law or fact, inherent differences do not explain the outcomes. Rather, policy grounds control. Thus, "[t]he real issue is not analytic, but allocative: what decisionmaker should decide the issue?" *Id.* (footnotes omitted).

99. Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305, 307 (7th Cir. 2002); Warner, *supra* note 66, at 135 (citing Barbour v. Browner, 181 F.3d 1342 (D.C. Cir. 1999)).

100. Warner, *supra* note 66, at 135.

101. *Id.* at 130.

102. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 440 (2001); *cf.* Allen & Pardo, *supra* note 62, at 1771 ("[T]he decision to label an issue 'law' or 'fact' is a functional one based on who should decide it under what standard, and is not based on the nature of the issue."). Of course, the basic rule allocating factual questions and legal questions to two different sets of institutional decision-makers itself is rooted in policy considerations. For evaluative determinations, however, the policy consideration itself informs what is treated as fact and what is treated as law. One special factor that may counsel toward treating an evaluative determination like a question of law subject to de novo review is if that evaluative determination and its underlying facts are dispositive of a constitutional question, where the constitutional norms almost necessarily must be developed through examination of "enough factually similar situations." Monaghan, *supra* note 80, at 273; *see* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984) (applying the doctrine of constitutional fact review to First Amendment claims where the underlying evaluations were outcome determinative); *see also* Ornelas v. United States, 517 U.S. 690, 691 (1996) (holding that determinations of reasonable suspicion and probable cause are reviewed de novo); Thompson v. Keohane, 516 U.S. 99, 112–13 (1995) (concluding that of the two inquiries "what were the circumstances surrounding the interrogation" and "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave," necessary to a "custody" determination for *Miranda* purposes, the latter is subject to de novo federal judicial review in habeas proceedings).

B. Common Questions of Fact in FOIA Cases

Under this basic framework, a close examination of FOIA cases reveals that they routinely present questions of fact. The most commonly invoked exemptions to disclosure in response to FOIA requests are exemptions 5, 6, and 7,[103] and these exemptions are likewise prevalent in FOIA disputes that result in litigation.[104] Accordingly, a discussion of the most frequent types of issues in FOIA litigation should focus on the questions that arise when records are withheld under these exemptions. As demonstrated in detail below, application of these exemptions frequently necessitates resolution of questions of fact.

1. Factual questions under exemption 5

Exemption 5 allows the government to withhold records that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[105] Although its plain language is far from clear,[106] the Supreme Court has explained that exemption 5 "simply incorporates civil discovery privileges."[107] The three standard privileges invoked under exemption 5 are the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege.[108] Of those, the deliberative process privilege is the most frequently used to withhold records.[109]

The deliberative process privilege is meant to "prevent injury to the quality of agency decisions."[110] As a threshold matter, no exemption 5 privilege, including the deliberative process privilege, can apply to a

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103. SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2010, *supra* note 44, at 6. Specifically, this report indicates that 7(C) is one of the three exemptions most often invoked. The issues in 7(C) cases are similar to the issues arising from the other subparts of exemption 7. As such, the full set of exemption 7 sections will be considered, all of which pertain to records "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7) (2006).

104. *See List of Freedom of Information Act Cases in Which a Decision Was Rendered in 2009 Including the Disposition of Each Such Case, The Exemption Involved and the Fees*, OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oip/cy09/09 rendered.htm (last visited Nov. 14, 2011).

105. 5 U.S.C. § 552(b)(5).

106. *See, e.g.*, Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 858 n.2 (D.C. Cir. 1980) (calling the language of exemption 5 a "rough guide" to what it is meant to protect).

107. United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984) (citing FTC v. Grolier Inc., 462 U.S. 19, 26 (1983)).

108. *Freedom of Information Act Guide: Exemption 5*, U.S. DEP'T OF JUSTICE (May 2004), http://www.justice.gov/oip/exemption5.htm.

109. *Id.*

110. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

record unless it is an inter- or intra-agency record.[111] Whether the record is inter- or intra-agency is therefore the first question to be decided in a deliberative process privilege case. If that initial threshold is passed, assessment of the deliberative process privilege requires a two-part inquiry: (1) the records must be "predecisional,"[112] and (2) they must be "deliberative."[113] Only records that meet all three components of this test may be withheld from the public.

The first threshold question—whether a record is inter- or intra-agency—is a compound question involving a question of historical fact (i.e., between whom was the record shared?) and a question of interpreting a legal standard (i.e., were those individuals within agencies as defined by FOIA?). This question of historical fact is rarely disputed; the government's account of with whom the record was shared is difficult for a plaintiff to challenge given judges' reluctance to grant a FOIA plaintiff discovery on the government agency defendant.[114] Additionally, the identity of individuals with whom the record was shared is frequently apparent on the face of the record, such as a memo from a contractor to a U.S. agency or a report from one agency to another. The rare case in which the inter- or intra-agency status of a record is disputed tends to present questions that demand a statement of more generally applicable law, such as whether records are still inter- or intra-agency if they are prepared at an agency's request by senators,[115] consultants,[116] or witnesses,[117] or if they are shared with litigation adversaries[118] or

111. Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 9 (2001) ("[T]he first condition of Exemption 5 is no less important than the second; the communication must be 'inter-agency or intra-agency.' . . . With exceptions not relevant here, 'agency' means 'each authority of the Government of the United States,' and 'includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency.'" (citations omitted)).

112. *Sears, Roebuck & Co.*, 421 U.S. at 151–52.

113. EPA v. Mink, 410 U.S. 73, 89 (1973), *superseded by statute*, 5 U.S.C. § 552(b) (2006); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980).

114. *See, e.g.*, Simmons v. U.S. Dep't of Justice, 796 F.2d 709, 711–12 (4th Cir. 1986) (upholding denial of discovery in FOIA case); Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1979) ("[In a FOIA case], if these [affidavit] requirements are met, the district judge has discretion to forgo discovery and award summary judgment on the basis of affidavits.").

115. Ryan v. Dep't of Justice, 617 F.2d 781, 789–90 (D.C. Cir. 1980).

116. Lead Indus. Ass'n v. Occupational Safety & Health Admin., 610 F.2d 70, 83 (2d Cir. 1979).

117. Brockway v. Dep't of the Air Force, 518 F.2d 1184, 1191 (8th Cir. 1975).

118. NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep't of Justice, 612 F. Supp. 1143, 1146 (D.D.C. 1985).

private parties advancing their own interests before the agency.[119] These types of issues require courts to pronounce generally applicable rules interpreting the breadth of "inter" or "intra" agency sharing under the statute and, therefore, may be appropriately resolved as matters of law and reviewed de novo.[120]

By contrast, the other two questions under exemption 5, much more frequently at issue, are difficult to characterize as anything other than case-specific factual inquiries or definition applications that should be treated like a factual inquiries. Whether a record is "predecisional" is an inquiry of historical fact: was the record created in anticipation of the decision to which it pertained, as opposed to created after the decision was made to justify, explain, disagree with, or otherwise discuss that past agency decision?[121] Likewise, whether a record is "deliberative" concerns whether the material is opinion, recommendation, or policymaking in nature, as opposed to factual or investigative.[122] To answer these questions, the decision-maker must examine how the agency's administrative process works and the role of the record at issue in that process.[123] The decision-maker will want to know historical facts, such as from whom the record originated and to whom it was circulated,[124] and whether the document was subsequently adopted as official agency policy.[125] The nature of the contents of the record itself will also be important, including whether the record reflects recommendations, draft material, or opinions, or whether it is governing agency policy as it affects the public or a mere

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119. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12 (2001).

120. *See* Warner, *supra* note 66, at 133 (explaining that determining a legal standard is a question of law). This question is indistinguishable from *Prima U.S. Inc. v. Panalpina, Inc.*, 223 F.3d 126 (2d Cir. 2000). There, the issue was whether a party was a "freight forwarder" under the Carriage of Goods by Sea Act, and the Second Circuit defined freight forwarders as those parties that do no more than arrange transportation and thus do not issue a bill of lading and do not consolidate cargo. *Id.* at 129. The case did not involve a dispute over the historical facts, but rather over a general rule that would apply to like cases in the future. *See* Warner, *supra* note 66, at 133 (using *Panalpina* as an example of a question that may appear to be a definition application, but is more appropriately viewed as legal interpretation of a definition).

121. *See* Vaughn v. Rosen, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975).

122. *See* EPA v. Mink, 410 U.S. 73, 89 (1973), *superseded by statute*, 5 U.S.C. § 552(b) (2006).

123. *See* Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 172–79 (1975).

124. *See* Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980) ("The identity of the parties to the memorandum is important; a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made.").

125. *See* Afshar v. Dep't of State, 702 F.2d 1125, 1142 (D.C. Cir. 1983).

recitation of factual material.[126] Then, the decision-maker will have to apply those facts to the definitions of "predecisional" and "deliberative."

Unlike the question with whom a record was shared outside the agency, when the question concerns the record's relationship to an agency decision, the plaintiff often can produce enough evidence without discovery to create a genuine dispute of fact based on agency statements and actions and the plaintiff's own information about the subject matter.[127] No decision on these issues will produce the type of statement of law that will apply generally to like cases; these decisions are completely fact-dependent. As the United States Court of Appeals for the District of Columbia Circuit explained, "[t]he cases in this area are of limited help to us, because the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process."[128] The Ninth Circuit has been more direct: "[T]he present case hinges on whether disclosure of the requested information would reveal anything about the agency's decisional process. This is a fact-based inquiry where deference to the district court's finding is appropriate."[129] It is incorrect to treat these questions, which constitute the bulk of questions decided in exemption 5 cases, as questions of law decided by a court and reviewed de novo. Rather, they are classic, fact-bound definition applications, typically left to the fact finder and reviewed deferentially.[130]

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126. *See Coastal States Gas Corp.*, 617 F.2d at 868.

127. Plaintiffs often know a fair amount about the general nature of the requested records, which is why, after all, they requested them. *See, e.g.*, McKinley v. FDIC, 744 F. Supp. 2d 128, 138–39 (D.D.C. 2010) (illustrating the plaintiff's knowledge of the FDIC records at issue in the case through plaintiff's argument that the FDIC records were gathered in a "'frantic scramble on the evening of March 13, 2008 and in the early morning of March 14, 2008 to gather as much raw data as possible, not any careful or considered culling of facts that would reveal the exercise of agency judgment'"), *aff'd sub nom.* McKinley v. Bd. of Governors of the Fed. Reserve Sys., 647 F.3d 331 (D.C. Cir. 2011); ACLU v. U.S. Dep't of Homeland Sec., 738 F. Supp. 2d 93, 108 (D.D.C. 2010) (explaining plaintiff's argument that withheld records contained factual information provided to the government "'during third party interviews conducted in connection with a review of detainee deaths by the Office of Inspections in 2007 and 2008'"); Williams & Connolly LLP v. SEC, 729 F. Supp. 2d 202, 213 (D.D.C. 2010) (explaining plaintiff's argument that the documents "contain merely factual material such as statements made by Corigliano or Kearney").

128. *Coastal States Gas Corp.*, 617 F.2d at 867.

129. Assembly of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 919 (9th Cir. 1992).

130. *See* Warner, *supra* note 66, at 135 (concluding that "[o]nly in the rare case, where strong countervailing policy considerations exist, should a question of definition application be reviewed de novo").

2. Factual questions under exemptions 6 and 7(C)

Factual disputes also routinely arise in cases involving exemption 6 and exemption 7(C). Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[131] Similarly, exemption 7(C), though it only pertains to records compiled for law enforcement purposes, covers records the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[132] Although the threshold issues of whether records are "personnel and medical and similar files"[133] and whether records are "compiled for law enforcement purposes"[134] differ, the issues that commonly arise in determining whether release of records would invade personal privacy are very similar.

Both exemptions 6 and 7(C) require the decision-maker to decide if release of the records would invade personal privacy and whether that invasion would be unwarranted.[135] Normally, whether something is unwarranted is an evaluative determination, akin to whether actions are reasonable or in good faith.[136] Were the categorization that simple, the courts would simply decide whether the privacy issue presented the type of evaluative determination best left to the fact finder or to an appellate court reviewing de novo.[137] In exemption 6 and 7(C) cases, however, "unwarranted" has been given a substantial amount of judicial gloss, which has created subsidiary questions worthy of independent consideration. To conduct an exemption 6 or 7(C) analysis, first, if there is no privacy interest in the records, the exemptions do not apply.[138] Second, if there is a cognizable privacy interest, the decision-maker must weigh the privacy interest in the

131. 5 U.S.C. § 552(b)(6) (2006).
132. *Id.* § 552(b)(7)(C).
133. As a practical matter, personnel and medical (and similar) files include just about anything that pertains to a person, and, as the D.C. Circuit acknowledged, it is a requirement that "is fairly minimal and is easily satisfied." Wash. Post Co. v. U.S. Dep't of Health & Human Servs., 690 F.2d 252, 260 (D.C. Cir. 1982). Accordingly, that issue is rarely seriously disputed in litigation.
134. *See infra* notes 154–155 and accompanying text (describing the test for "law enforcement purposes").
135. 5 U.S.C. § 552(b)(6), (7)(C).
136. *See* Warner, *supra* note 66, at 120 (defining "evaluative determination" as "requir[ing] a decision-maker to exercise judgment" so that "any time an issue uses words like 'reasonable' or 'fair'" an evaluative determination will be made).
137. *See id.* at 130 (explaining that evaluative determinations are considered legal or factual on a case-by-case basis based on policy considerations).
138. *See* U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 600 (1982) (holding that for the exemption to apply, information must be personal in nature); *cf.* FCC v. AT&T Inc., 131 S. Ct. 1177, 1185 (2011) (holding that corporations do not have "personal privacy" under exemption 7(C) (internal quotation marks omitted)).

records against the public interest in disclosure.[139]

The Supreme Court has emphasized the "personal" nature of records as critical to the analysis of whether a privacy interest is at stake.[140] The potential effect of releasing the record on the individual concerned is always a central inquiry, including whether the release may cause harm to the individual or his reputation,[141] whether the release may put the individual in danger of third-party retaliation,[142] and even (weighing on the side of release) whether the release may lead to some benefit to the individual.[143] These questions fall squarely in the category of factual inquiries: they are predictive hypothetical factual questions.[144] They require the decision-maker to determine what would happen in the event of the record's release—a question that necessarily is specific to the kind of record and the circumstances surrounding the record. Other types of factual inquiries may also be required to determine if a privacy interest exists. For instance, the exemption generally reaches records that concern individuals, but not business or professional records.[145] The line between those categories can be blurry.[146] Thus, whether records fall in one category or another is naturally a fact-bound inquiry concerning the

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139. Although courts balance the same two factors against each other under both exemptions, the weight accorded to each factor differs. Under exemption 6, which allows withholding where disclosure "would" result in "clearly unwarranted" invasion of personal privacy, it takes a comparatively strong privacy interest to outweigh the public interest in disclosure. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 (1989). Under exemption 7(C), however, withholding is permitted if release "could reasonably be expected to" result in "unwarranted" invasion of personal privacy, and the balance is much more in favor of privacy. *Id.* Although courts weigh the privacy interest differently under exemptions 6 and 7(C), the nature of the inquiry is the same, and this Article therefore treats them together.

140. *See Wash. Post Co.*, 456 U.S. at 600.

141. *Id.*

142. U.S. Dep't of State v. Ray, 502 U.S. 164, 177 (1991). *But see id.* at 180 (Scalia, J., concurring) (arguing that exemption 6 claims should be evaluated on the basis of what the requested information "*reveals*" rather than the possible scenarios revelation may "lead to," including third-party retaliation).

143. *See* Lepelletier v. FDIC, 164 F.3d 37, 39, 47–48 (D.C. Cir. 1999) (ordering the release of bank depositors' names so that they could recover over three million dollars in unclaimed funds that would otherwise be forfeited to the FDIC).

144. *Cf.* Warner, *supra* note 66, at 117–18 (exemplifying a hypothetical prediction of fact question as predicting "what the plaintiff's business would have earned but for the breach" in a contract case for lost-profit damages).

145. *See* FCC v. AT&T Inc., 131 S. Ct. 1177, 1185 (2011) (holding that corporations do not have "personal privacy" rights under exemption 7(C)); Sims v. CIA, 642 F.2d 562, 575 (D.C. Cir. 1980) ("Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships.").

146. *See, e.g.*, Multi Ag Media LLC v. Dep't of Agric., No. 05-01908 (HHK), 2006 WL 2320941, at *2 (D.D.C. Aug. 9, 2006) (examining exemption 6 in the context of records of a business individually owned or closely held), *rev'd in part*, 515 F.3d 1224 (D.C. Cir. 2008).

individual, the nature of the business, and the relationship of the records to the individual and the business.

The public interest side of the balancing test is no less fact-bound. The public interest in the release of records is an interest that has been strictly bounded by judicial interpretation. The only public interest that matters for the purposes of the exemption 6 and exemption 7(C) balancing tests is the public's interest in knowing about the operations and activities of government.[147] Determining if the release of the record will inform the public about the operations or activities of government is, like the first prong, a question of predictive hypothetical fact, not a question of law.

The Supreme Court has attempted to generalize the analysis in a way that might suggest that the questions are, at their base, legal questions. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,[148] the Court announced that "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction."[149] Considering the request for the "rap sheet" of a particular individual, the Court declined to consider any special circumstances about the individual and considered only the "nature of the requested document and its relationship" to the recognized public interest.[150] Using the categorical approach, the Court concluded that "[t]he privacy interest in maintaining the practical obscurity of rap-sheet information will always be high," while the public interest was at its "nadir."[151]

Despite the Court's insistence that the proper approach is "categorical," which implies the creation of a generally applicable legal standard, post-*Reporters Committee* analyses have remained intensely fact-bound. As the leading FOIA treatise states, "[i]t is difficult to generalize about whether certain kinds of files are or are not exempt. . . . One must usually proceed by example."[152] The D.C. Circuit is equally unconvinced: "[A]ll of these [exemption 6 balancing test] inquiries are fact-intensive, delicate, and far better suited in the first instance for the ruminations of a single trial judge,

147. U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 497 (1994); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989); Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976).
148. 489 U.S. 749 (1989).
149. *Id.* at 776.
150. *Id.* at 772.
151. *Id.* at 780.
152. HARRY A. HAMMITT ET AL., LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 2010, at 183 (25th ed. 2010).

expert at finding facts, rather than for the deliberations of a three-judge committee far more adept at finding fault."[153]

3. Factual questions under other parts of exemption 7

Application of exemption 7 likewise necessitates resolving myriad factual issues. To begin, the threshold qualification for exemption 7 is that the records be "compiled for law enforcement purposes."[154] In a majority of circuits, even this initial question requires a decision-maker to determine if the investigation to which the records relate is for the purpose of enforcing federal law or ensuring national security, and if there is a "colorable claim" that the investigation is related to the agency's law enforcement duties.[155] The purpose for which a record was created is a question of historical fact, and whether there is a colorable claim of rationality for the investigation is most like an evaluative determination. As such, at least half of the threshold exemption 7 inquiry is purely factual.[156]

Exemption 7, furthermore, does not exempt all law enforcement records from release. Rather, it exempts only those whose release would cause one of the six identified types of harm that qualify a record for withholding.[157] One of those, exemption 7(C), covers

153. Summers v. Dep't of Justice, 140 F.3d 1077, 1083 (D.C. Cir. 1998).

154. 5 U.S.C. § 552(b)(7) (2006).

155. Abdelfattah v. U.S. Dep't of Homeland Sec., 488 F.3d 178, 184 (3d Cir. 2007) (per curiam); Pratt v. Webster, 673 F.2d 408, 420–21 (D.C. Cir. 1982); *see also* Binion v. U.S. Dep't of Justice, 695 F.2d 1189, 1193–94 (9th Cir. 1983) (describing the initial determination for whether a record falls within exemption 7 as deciding whether a "rational nexus" exists between law enforcement duties and the document).

156. Again, courts have attempted to categorize claims to some extent. For instance, the D.C. Circuit has articulated differing standards for agencies whose "primary function involves law enforcement," to which the court applies "a more deferential standard to a claim that information was compiled for law enforcement purposes," and for "mixed-function" agencies, whose claims of law enforcement purposes a court "must scrutinize with some skepticism." Tax Analysts v. IRS, 294 F.3d 71, 77 (D.C. Cir. 2002) (quoting *Pratt*, 673 F.2d at 418) (internal quotation marks omitted). Nonetheless, every agency, even agencies with primary functions involving law enforcement, must make some degree of showing that the records were compiled for law enforcement purposes. *See Pratt*, 673 F.2d at 421 (explaining that although the court may afford deference to primarily law enforcement agencies, review is not "vacuous"). In any case, that any deference is afforded such agencies in their assertion of law enforcement purpose is at odds with the plain language of FOIA, which mandates de novo review of agency withholdings. 5 U.S.C. § 552(a)(4)(B).

157. *See* 5 U.S.C. § 552(b)(7)(A)–(F) (exempting records compiled for law enforcement purposes that "(A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . , (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure

privacy, discussed above in conjunction with exemption 6.[158] The others can be divided into two categories. The first category concerns records that, if released, would cause a particular harm, which is a question of predictive hypothetical fact for a decision-maker to find. The three exemption 7 subsections that fit into this first category of causing a particular harm include records that, if released: "(A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, . . . or (F) could reasonably be expected to endanger the life or physical safety of any individual."[159]

Determining whether the release of a record could reasonably be expected to interfere with law enforcement requires the decision-maker to examine the nature of the investigation, the record's relationship to the investigation, the likely course of the investigation in the future, and the possible ways that the public or the requester could use the record to interfere with the investigation.[160] These are historical and predictive facts that essentially determine the outcome of an exemption claim.[161] For this reason, the Ninth Circuit expressly

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could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual").

158. *See supra* notes 139–146 and accompanying text.

159. 5 U.S.C. § 552(b)(7)(A)–(B), (F).

160. *See, e.g.*, Campbell v. Dep't of Health & Human Servs., 682 F.2d 256, 265 (D.C. Cir. 1982) (urging a fact-based analysis and requiring a district court to conduct a "focused" and "particularized" review of the documentation on which the government based its claim that releasing the sought-after information would interfere with the investigation). The nuances of these rules are beyond the scope of this Article, as this section seeks to demonstrate that questions of fact arise as a routine matter in FOIA cases. Some generally applicable legal interpretations of these standards have been enunciated. *See, e.g.*, Juárez v. Dep't of Justice, 518 F.3d 54, 59 (D.C. Cir. 2008) (holding that for exemption 7(A) to apply, an investigation does not have to be concrete, but rather can be mere evidence gathering for a potential case). Furthermore, in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court attempted to "generalize" the inquiry under 7(A), similar to its treatment of exemption 7(C) in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776 (1989), by allowing courts to decide that in "particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings," *Robbins*, 437 U.S. at 236 (internal quotation marks omitted). Like *Reporters Committee*, this attempt at generalization had little effect on the need for factual determinations under exemption 7(A) as the "kinds of investigatory records" are both numerous and fact-specific.

161. Although exemption 7(A) authorizes the government to withhold records if their release "could reasonably be expected to" produce the relevant harm, its application does not demand an evaluative determination. S. REP. NO. 98-221, at 23 (1983). Rather, "could reasonably be expected to" relieves the decision-maker of the need to meet the exacting standard of a concrete prediction, and was "intended to clarify the degree of risk of harm from disclosure which must be shown to justify withholding." *Id.* Therefore, it is not a question of subjective or objective determinations, but rather how certain the fact finder must be that the harm will occur.

treated one district court's determination that revealing a certain report could reasonably be expected to interfere with a government investigation as a factual determination.[162] Other harm-predicting subsections of exemption 7 require similar inquiries.[163]

The second category of exemption 7 subsections concerns specific types of information and allows withholding of records the release of which "(D) could reasonably be expected to disclose the identity of a confidential source, . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."[164] The decision-maker applying these two subsections would need to engage in a fact-bound definition application. For instance, the decision-maker would need to answer the question, "Do the records contain 'the identity of a confidential source?'"[165] Given that the Supreme Court defined confidential sources to include any source where the information was provided "with the understanding that the [law enforcement agency] would not divulge the communications except to the extent . . . necessary for law enforcement purposes,"[166] deciding whether a source is confidential requires a fact finder to determine the source's prior mental state—a question of historical fact.[167]

In sum, a close look at the questions that decision-makers must

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162. Lion Raisins Inc. v. U.S. Dep't of Agric., 354 F.3d 1072, 1078 (9th Cir. 2004) ("The district court's application of [exemption 7(A)] in this case was grounded in its findings of fact.").

163. *See* 5 U.S.C. § 552(b)(7)(B), (F); ACLU v. Dep't of Def., 543 F.3d 59, 68 (2d Cir. 2008) (explaining that exemption 7(F) requires a showing of expected danger to an identifiable individual or group of individuals), *vacated*, 130 S. Ct. 777 (2009) (mem.); Wash. Post Co. v. Dep't of Justice, 863 F.2d 96, 101 (D.C. Cir. 1988) (describing exemption 7(B) as "meant to prevent disclosures from conferring an unfair advantage upon one party to an adversary proceeding or leading to prejudicial publicity in pending cases that might inflame jurors or distort administrative judgment").

164. 5 U.S.C. § 552(b)(7)(D)–(E).

165. *Id.* § 552(b)(7)(D).

166. U.S. Dep't of Justice v. Landano, 508 U.S. 165, 174 (1993).

167. *See* Warner, *supra* note 66, at 117 (noting that because the only direct evidence of a person's mental state, an inquiry of historical fact, is her own testimony, "circumstantial evidence is almost always necessary to prove such historical facts"). Although it may seem impossible for a fact finder to determine the exact mental state of the source, the Supreme Court in *Landano* held that a court could consider various types of evidence to determine the source's belief that the statements would be kept confidential, including the agency's statements, any promises of confidentiality, whether the informant was paid, the nature of the relationship between the informant and the agency (including where and when meetings and information exchange would take place), the nature of the crime at issue, and the source's relationship to the crime. *Landano*, 508 U.S. at 172, 179. These questions, too, are questions of fact.

answer with respect to the most commonly invoked exemptions to disclosure reveal that factual issues in FOIA cases arise routinely. Many of those factual issues are pure issues of historical or predictive fact—not even the type of question often thought of as a "mixed" question. Others are definition applications that are fact-bound, typically left to the fact finder, and reviewed deferentially.

III. TREATMENT OF FACTUAL DISPUTES IN FOIA VERSUS NON-FOIA LAWSUITS

As described above, FOIA cases involve myriad factual disputes that arise under some of the most commonly claimed exemptions. Therefore, there is every reason to think that FOIA cases would, like other civil cases, result in a significant number of trials at which factual disputes are resolved. Yet, an examination of summary judgment procedures in FOIA cases, empirical evidence of FOIA dispositions, and standards of review in FOIA cases demonstrate that FOIA cases are not treated like other civil cases. In fact, the special treatment of FOIA cases results in virtually no FOIA trials.

A. Rule 56 as Applied to FOIA Cases

An examination of cases decided on summary judgment, particularly the unique procedures designed by courts for FOIA cases, demonstrates that genuine factual disputes are routinely decided at the summary judgment stage. This practice is contrary to the express commands of the Federal Rules of Civil Procedure.[168] Under Rule 56, summary judgment may be granted to a party only when the court concludes that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[169] As a practical matter, this standard suggests summary judgment can be granted in two circumstances. First, summary judgment is appropriate when the parties do not dispute material facts and the only issues presented are questions of law.[170] Second, summary judgment is appropriate even when factual disputes may exist, so long as there is no factual dispute that is both "genuine" and "material."[171]

As to the second type of summary judgment grant, a genuine dispute means that there is more than the "mere existence of a scintilla of evidence" on both sides, and a material dispute is one that

168. *See* FED. R. CIV. P. 56(a).
169. *Id.*
170. *Id.*
171. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

would affect the outcome of the case (or, for partial summary judgment, would affect resolution of the issue on which summary judgment is sought).[172] This type of summary judgment decision requires the court to assess the sufficiency of the evidence. If there is insufficient evidence to allow a reasonable fact finder to rule in favor of the non-moving party, summary judgment for the moving party is appropriate.[173] Importantly, under Rule 56(d), a court may deny a summary judgment motion where the opposing party has presented an adequate reason for its inability to present evidence necessary to demonstrate a genuine issue of material fact, including inadequate opportunity for discovery.[174]

If the moving party does not bear the burden of proof at trial, that party can win a motion for summary judgment merely by demonstrating a lack of evidence on any single essential element of the case that the non-moving party must establish.[175] That is, if the plaintiff has the burden of proof and the defendant moves for summary judgment—the most typical scenario—the defendant need only show that the plaintiff does not have sufficient evidence on any single element of the claim.[176] Thus, in a negligence case in which the plaintiff must show duty, breach, causation, and damages, the defendant is entitled to summary judgment if it can show that the plaintiff lacks sufficient evidence on any one of those four elements. On the other hand, if the moving party has the burden of proof at trial, that party—typically the plaintiff—must demonstrate sufficient undisputed evidence to meet the burden on each element of the claim. Even then, summary judgment will be defeated if the non-moving party (who does not have the burden of proof at trial) demonstrates a genuine dispute as to any one of those elements.[177] As a result, it is much more difficult for the party with the burden of proof at trial to win a motion for summary judgment.[178]

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172. *Id.* at 248, 252.
173. *Id.* at 248.
174. FED. R. CIV. P. 56(d), 28 U.S.C. app. r. 56(d) (Supp. III 2010) (amended 2010).
175. Especially after *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which holds that a defendant need not prove the non-existence of an essential element but must point to a lack of evidence as to the plaintiff's claim, *id.* at 322–23, exactly what the defendant has to do to demonstrate this lack of evidence is a matter of some debate. *See* Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After The Trilogy*, 63 WASH. & LEE L. REV. 81, 119-21 (2006).
176. Steinman, *supra* note 175, at 98.
177. *Celotex*, 477 U.S. at 331 (Brennan, J., dissenting).
178. *See* Trautmann v. Cogema Mining, Inc., No. 5:04-cv-117, 2006 WL 2716156, at *2 (S.D. Tex. Sept. 20, 2006) (explaining that the summary judgment burden is heavier on a moving party when that party bears the burden of proof at trial).

Unlike typical civil litigation in which the plaintiff bears the burden of proving the merits of the claim, in a FOIA case, the government defendant bears the burden of proof that a withheld record falls within one of FOIA's exemptions to disclosure.[179] Accordingly, it is the government that, by law (if not in practice), has the more difficult task at the summary judgment stage of FOIA lawsuits.

Importantly, a court considering motions for summary judgment is charged to decide only whether evidence is sufficient to permit a jury to find for the non-moving party, which is a question of law.[180] The court is not permitted to "weigh the evidence and determine the truth of the matter" itself.[181] That is, the court cannot make factual determinations when ruling on a motion for summary judgment.

Although the Federal Rules of Civil Procedure apply to FOIA cases as they do in all other federal civil litigation, courts have fashioned unique procedures for FOIA cases. First, although the government possesses most (if not all) of the information relevant to the lawsuit, discovery is disfavored and rarely granted to a FOIA plaintiff.[182] This trend is particularly troubling in light of the D.C. Circuit's acknowledgement that "[t]his lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution."[183] Rather than require strict adherence to normal discovery rules, however, the D.C. Circuit in *Vaughn v. Rosen*[184] outlined a new procedure, now known as the *Vaughn* index, under which the government must produce a detailed affidavit indexing the withheld records and giving a justification for each record's withholding.[185]

Another way courts can overcome some of the information imbalance unique to FOIA litigation is to review in camera the requested records at issue.[186] Although the district court has broad statutory authority to use this procedure to test claims of exemption, courts have mostly declined to require it, and, because there is no absolute right to in camera inspection in any given circumstance, it is difficult for a plaintiff to compel a court to use this method.[187] Where

179. 5 U.S.C. § 552(a)(4)(B) (2006).
180. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).
181. *Id.* at 249.
182. HAMMITT ET AL., *supra* note 152, at 390; *see also* Judicial Watch, Inc. v. U.S. Dep't of Justice, 185 F. Supp. 2d 54, 64 (D.D.C. 2002) (denying plaintiff's request for discovery).
183. Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973).
184. 484 F.2d 820 (D.C. Cir. 1973).
185. *Id.* at 826–27.
186. 5 U.S.C. § 552(a)(4)(B) (2006).
187. *See* Spirko v. U.S. Postal Serv., 147 F.3d 992, 996–97 (D.C. Cir. 1998) (noting

the records are voluminous and review of all the records would be burdensome, courts can also conduct in camera review using a sampling procedure.[188]

In camera review cannot, of course, help a judge determine matters extrinsic to the document, including the circumstances of its creation or use. Additionally, in camera review may not reveal any indication of harm that might result from the document's release. *Vaughn* indices do provide some of the relevant extrinsic information, but they do not give the plaintiff the opportunity to do much more than point out any deficiencies or discrepancies in the descriptions of the records. Unless the plaintiff happens to have contrary evidence gathered from some other source, the government's assertions in the *Vaughn* index go largely unchallenged, assuming they are adequately detailed. Although courts may normally require a plaintiff to have a certain quantum of evidence creating a genuine dispute, in the case of information imbalance with no real opportunity for discovery, one might expect a court to lower the plaintiff's burden in opposing the government's motion for summary judgment and be more hesitant than usual to grant summary judgment to the government.

But the reality is to the contrary. In FOIA cases decided on summary judgment, courts often give deference to the government's characterization of the records and make factual findings in the government's favor even when disputed evidence exists.[189] For instance, in *Access Reports v. Department of Justice*,[190] the D.C. Circuit reversed the district court's entry of summary judgment for the plaintiff based on the government's failure to meet its burden to justify withholding under exemption 5's deliberative process privilege,[191] noting:

> The question remains whether the memo as a whole is "predecisional". Here, the memo . . . [appears] postdecisional . . . :

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the district court's broad discretion to view records in camera or to decline to do so).

188. Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1490 (D.C. Cir. 1984).

189. *See generally* Rebecca Silver, Comment, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731, 735–40 (2006) (describing the circuit split on the appropriate standard of review for summary judgment decisions in FOIA cases and providing some hypotheses for why the split exists). Although Silver's analysis involves an assertion that factual disputes exist in FOIA cases and that those issues are overlooked in courts' rush to decide FOIA cases on summary judgment, unlike this Article, Silver does not analyze what questions in FOIA cases are properly categorized as questions of fact, attempt an empirical demonstration that summary judgment is overused in FOIA cases, or delve into the ways in which the failure of courts to acknowledge factual disputes in FOIA cases necessitating trials disadvantages requesters and hinders the realization of FOIA's transparency objectives.

190. 926 F.2d 1192 (D.C. Cir. 1991).

191. *Id.* at 1193.

> Robinson prepared the memo to help his superiors in the process of defending the legislative package that the Department had already offered. But Robinson's chiefs never asked him . . . to "explain" the decision to initiate a legislative proposal. They certainly did not seek his work as a draft or some sort of agency "working law" on when to offer FOIA amendments . . . .[192]

The court's analysis is difficult to characterize in any way other than weighing the evidence and making factual findings. On the one hand, some evidence showed the records at issue purported to justify an agency decision that was already made and explain how a variety of cases should come out under that decision, while other evidence tended to indicate the records were prepared more as "talking points" for handling upcoming questioning on agency policy.[193] Competing evidence therefore existed, and the appellate court made its own factual finding regarding the agency's use of the records rather than denying summary judgment to both parties and ordering a trial take place for the purpose of fact finding. Not only were these statements made in the context of a summary judgment decision, they were made by a court of appeals reversing the district court's decision, thereby substituting the appellate court's factual determinations for the factual determinations made in the first instance by the district court.

In another case, the D.C. Circuit, again overturning the district court's grant of summary judgment to the plaintiff,[194] considered the government's claim that release of the records would interfere with a law enforcement investigation:

> [W]e hold that the government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it is reasonable. A complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation would give terrorist organizations a composite picture of the government investigation, and since these organizations would generally know the activities and locations of its members on or about September 11, disclosure would inform terrorists of both the substantive and geographic focus of the investigation. Moreover, disclosure would inform

192. *Id.* at 1196.

193. *See id.* (noting that "[b]ecause the memo explores how a set of cases might play out under the Department's proposals, it may look like a guide to decision of future cases and thus a kind of agency law," but then concluding instead that the memo was in fact prepared in part as "ammunition for the expected fray").

194. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 920 (D.C. Cir. 2003).

> terrorists which of their members were compromised by the investigation, and which were not. This information could allow terrorists to better evade the ongoing investigation and more easily formulate or revise counter-efforts.[195]

Here, again, the appellate court has substituted its own view of the questions of predictive hypothetical fact posed by the case for the district court's determination, and both courts have claimed to decide the case as a matter of law under a summary judgment standard.

Examples like these are not hard to find. Many FOIA summary judgment decisions contain what appear to be factual findings, often concerning the factual questions identified above in Part II.[196] In many instances, the factual findings may not appear contested, but the plaintiff had very little opportunity to discover contrary evidence. In others, such as in *Access Reports*, contrary evidence is discussed, weighed, and rejected at the summary judgment stage.[197] Either way, the special procedures developed uniquely for FOIA and the summary judgment decisions that contain factual findings offer evidence that FOIA cases are not being ordered to proceed to trial like other civil cases with genuine, material factual disputes.

B. Empirical Analysis of FOIA Dispositions

To lend empirical support to this Article's contention that judges regularly convert questions of fact into questions of law in FOIA cases, I focused on the following questions: (1) How many FOIA trials are there?; (2) Are FOIA trials any rarer than trials in other civil cases, which we know occur less and less frequently?; and (3) If the FOIA trial rate is lower than the trial rate in other civil cases, is it the result of an increased rate of adjudication of all issues in the case as a matter of law or for some other reason, such as a higher-than-average

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195. *Id.* at 928. This case was also noteworthy because, for the first time, it gave deference to the government's harm prediction under exemption 7(A), a deference that had typically been reserved for national security exemption claims under exemption 1 (exempting properly classified records) and exemption 3 (incorporating a statutory exemption for CIA intelligence sources and methods), not law enforcement record claims. *Id.*; *see also* 5 U.S.C. § 552(b)(1), (3) (2006); 50 U.S.C. § 403-1(i)(1) (protecting from disclosure CIA "intelligence sources and methods"); ACLU v. U.S. Dep't of Def., 628 F.3d 612, 619 (D.C. Cir. 2011) (recognizing that 50 U.S.C. § 403-1(i)(1) is an exemption 3 statute). This type of deference also contradicts FOIA's mandate that the district court review withholdings de novo. *See* 5 U.S.C. § 552(a)(4)(B) (establishing de novo judicial review of agency withholdings).

196. *See supra* Part II.B (delineating the factual questions that arise under FOIA exemptions 5, 6, and 7).

197. *Access Reports*, 926 F.2d at 1193–94.

settlement rate? This Part attempts to answer these questions.

1. Description of data

I used data collected by individual district courts clerks' offices that is reported to the Administrative Office of the U.S. Courts and assembled by the Federal Judicial Center ("FJC Database").[198] The FJC Database contains data reported on each individual federal court case, including the parties' names, the docket number, the filing and termination dates, the nature of the lawsuit (case type), the type of disposition, the prevailing party, and the amount of the judgment.[199]

The field that describes the nature of the lawsuit is important for comparing FOIA cases to other civil cases. The FJC Database uses one code to designate cases brought under FOIA, and those cases are therefore easily identified.[200] FOIA cases began appearing in the FJC Database in 1977.[201] In addition to FOIA cases, approximately one

198. FJC Database, *supra* note 59. Specifically, within the FJC Database, I used the Civil Terminations portion of the data, which describes data for all civil cases that were terminated, rather than pending civil cases. It does not include any criminal case data.

199. *Id.*

200. This code is "nature of suit 895." Code 895 also includes cases brought under the Privacy Act, 5 U.S.C. § 552a (2006). Privacy Act cases are far less common but involve similar questions of whether certain government-held records are exempt from disclosure; the most significant differences are that a Privacy Act claim can only be made by the person whom the records concern and that the Privacy Act mandates certain recordkeeping practices. 5 U.S.C. § 552a (2006). The exemptions under the Privacy Act closely track or incorporate by reference the FOIA exemptions. For example, like FOIA, the Privacy Act exempts investigatory material compiled for law enforcement purposes and incorporates FOIA's exemption of properly classified material. 5 U.S.C. § 552a(k)(1)–(2). Because the questions that arise in deciding FOIA claims and Privacy Act claims are similar, the Privacy Act data do not meaningfully corrupt the FOIA data.

201. Although the original Freedom of Information Act was enacted in 1966 and went into effect in 1967, the FOIA nature of suit code refers to the Freedom of Information Act of 1974, which is when the Act was substantially overhauled and took a form similar to its present form. Freedom of Information Act Amendments of 1974, Pub. L. No. 93–502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552). Under the original 1966 Act, agencies found myriad ways of avoiding compliance with Congressional intent in enacting FOIA, and courts construed some exemptions very broadly. *See* Vladeck, *supra* note 14, at 1798 n.72 (citing high fees, long delays, and evasive responses as methods of agency evasion, and court decisions on law enforcement and national security exemptions as overly broad). In the 1974 Act, Congress imposed many more restrictions on agencies, including deadlines for agency compliance and limits on fees agencies could charge; gave many more rights to requesters seeking judicial review, including a de novo standard of review in litigation and the right to attorneys' fees in the successful prosecution of a FOIA case; and substantively limited some of the exemptions that were subject to abuse. *Id.* So unprecedented was this type of access to government records that Justice Antonin Scalia, at the time a law professor at the University of Chicago, proclaimed that the 1974 amendments

> can in fact only be understood as the product of the extraordinary era that produced them—when "public interest law," "consumerism," and

hundred other "nature of suit" codes appear in the FJC Database, in categories such as torts to land and antitrust.[202] I have excluded certain nature of suit categories from the group of non-FOIA civil cases used for comparison in this Article because of their tendency to skew the data on case resolution.[203]

The other FJC Database field of primary concern to this Article is the disposition field, which describes how the case was terminated. The disposition field did not take a form useful to this Article until 1979, but it has been continually reported since then.[204] Although the

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> "investigative journalism" were at their zenith, public trust in the government at its nadir, and the executive branch and Congress functioning more like two separate governments than two branches of the same.

Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 15. With some lag, perhaps in reporting or in the commencement of suits under the 1974 Act, FOIA cases do not begin to appear in the FJC Database until 1977. FJC Database, *supra* note 59.

202. FED. JUDICIAL CTR., *Federal Court Cases: Integrated Database* (1979–2008), *Codebook for Civil Terminations Data, 1979-2008* (Inter-University Consortium for Political and Social Research, University of Michigan) [hereinafter FJC Database Codebooks]. To access the Codebook for any given dataset, go to the website listed *supra* note 59, click on the desired dataset, and then download the folder containing the files for that dataset. These files are also available upon request from the author and are on file with the *Law Review*.

203. Those excluded categories include prisoner petitions, government recovery of overpayment of public benefits, and government recovery of defaulted student loans, represented by nature of suit codes 150, 151, 152, 153, 510, 520, 530, 535, 540, 550, and 555. Prisoner cases tend to have a very high rate of dismissal because of frivolous filings and denials of petitions to proceed in forma pauperis, and government cases to collect benefit overpayments or student loan debt tend to have high default rates. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 713 n.10 (2004); *see also* Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 877, 881 n.60 (2007) (noting the exclusion of prisoner cases from summary judgment rates). Because those categories of cases tend to be non-adversarial or uncontested, excluding those cases prevents the distortion of results about the outcomes of federal civil litigation. Hadfield, *supra*, at 713.

204. Although disposition was reported in 1970, that year is prior to any reported FOIA cases, making that year's data irrelevant to this Article. *See* FJC Database 1970, *supra* note 59. From 1971 to 1978 the FJC Database does not report a disposition field at all. Rather, researchers have been able to reconstruct a rough categorization of dispositions between those dates by combining the information contained in the procedural progress field and the "judgment for" field. *E.g.*, Hadfield, *supra* note 203, at 708. When looking to identify how many trials have occurred, for some researchers it has been appropriate to count cases in which a "judgment for" a party was reached during or after a "trial." *E.g.*, *id.* For instance, if the researcher seeks to understand the use of judicial resources, such a definition of disposition by "trial" might be appropriate. *Id.* That count includes, however, dispositions by motion that occur during or after a trial, such as disposition by directed verdict. For the purposes of this Article, that method would over-count the relevant trials and under-count the relevant motions resolutions because a case that is disposed of by directed verdict is resolved by a standard that mirrors the summary judgment standard. FED. R. CIV. P. 50. Thus, re-creating the 1971 to 1978 data in this fashion would be inappropriate. Moreover, it would only add two years of data for FOIA dispositions, because no FOIA cases are reported until 1977. I have therefore decided to limit the data to the

number of disposition categories has changed twice, the categories used in this Article have remained constant.[205] The codes that reflect trials have consistently been "judgment on jury trial" and "judgment on court trial" since the 1979 coding began.[206] For the purposes of this Article, when calculating the trial rates for FOIA cases and other civil cases, a jury trial and a bench trial are equivalent. Both types of trials indicate that summary judgment dispositions were inappropriate; that is, the court found there were genuine disputes of material fact and that judgment as a matter of law was therefore unwarranted.[207] Whether a denial of summary judgment results in a bench or jury trial is determined by the type of claim at issue.[208] This

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reported data beginning in 1979, which encompasses nearly all known FOIA dispositions and more accurately counts FOIA trials.

205. From 1979 to 1986, the disposition field contained twelve codes: transferred to another district; remanded; dismissed for want of prosecution; dismissed, discontinued, settled, withdrawn, etc.; judgment on default; judgment on consent; judgment on motion before trial; judgment on jury verdict; judgment on directed verdict; judgment on court trial; judgment on other; and, starting in 1984, statistical closing. FJC Database Codebooks 1979–1986, *supra* note 202. In 1987, the number of codes expanded to nineteen. All of the previous codes remained, except: "remanded" expanded to two categories, "remanded to state court" and "remanded to U.S. agency"; "dismissed, discontinued, settled, withdrawn, etc.," expanded to four codes for dismissal, including dismissed for lack of jurisdiction, dismissed: voluntarily, dismissed: settled, and dismissed: other; two judgment categories were added, including judgment on award of arbitrator and judgment on trial de novo after arbitration; and a code for multi-district litigation transfer was introduced. FJC Database Codebooks 1987–1990, *supra* note 202. Furthermore, in 1991, codes for appeal affirmed from a magistrate and appeal denied from a magistrate were added. FJC Database Codebooks 1991–2008, *supra* note 202.

206. These are codes 7 and 9, respectively, in the disposition field. Clerks' offices are instructed to report code 7 when "[t]he action was disposed of by entry of a final judgment resulting from a verdict by a jury (other than a directed verdict)" and code 9 when "[t]he action was disposed of by entry of a final judgment resulting from a decision by a judge or magistrate judge during or after a trial (other than a jury trial)." TRAINING & SUPPORT DIV., ADMIN. OFFICE OF THE U.S. COURTS, CIVIL STATISTICAL REPORTING GUIDE 3:19 (version 2.1 July 1999).

207. *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

208. Whether a litigant has a right to a jury trial is a complex question. As a constitutional matter, only litigants advancing claims for monetary damages or other claims comparable to a common law suit historically tried in a court of law are entitled to a jury trial under the Seventh Amendment, and even then, such litigants are not entitled to a jury trial if the claims are made against the United States or brought in state court. *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."); FED. R. CIV. P. 38(a)–(b) (preserving a right to a jury trial in federal courts, while also allowing a party to opt to proceed by bench trial); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) ("[W]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was."); Lehman v. Nakshian, 453 U.S. 156, 169 (1981) (holding that sovereign immunity dictates that the Seventh Amendment does not apply to claims against

Article, however, is concerned only with the question whether factual questions were deemed to exist in the case, such that an evidentiary trial was necessary, regardless of the type of trial appropriate for the claim. As such, to calculate the trial rates, I combine bench trials and jury trials.[209]

Gillian Hadfield, professor of law and economics at the University of Southern California, conducted an audit of the FJC data disposition codes by comparing them to Public Access to Court Electronic Records (PACER) court system records and demonstrated that these two trial codes are highly accurate.[210] Each of these codes has very few "type 1" errors—the mistaken inclusion of cases that were disposed of in other, non-trial ways.[211] Moreover, audits of other codes, including some of the most suspect and ambiguous disposition codes, indicate relatively few "type 2" errors—the failure to include actual trial adjudications in the trial adjudication categories.[212] The

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United States); Curtis v. Loether, 415 U.S. 189, 192 (1974) (noting the Seventh Amendment has not been incorporated through the Fourteenth Amendment to apply to suits brought in state court).

209. Other empirical studies have likewise combined these two categories to achieve a single trial rate across types of cases. *E.g.*, Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 435 (2004). I have not included certain dispositions in my "trial rate" that other researchers have included. One notable code I have not included in the "trial rate" is directed verdicts. The differences in choice are a result of difference in purpose. For instance, Hadfield included directed verdicts in some descriptions of the trial rates because a directed verdict would indicate that a trial or some part of a trial had taken place. Hadfield, *supra* note 203, at 713 tbl.1. Hadfield was trying to compare trial rates to settlement rates. *Id.* For this Article's purposes, however, inclusion of directed verdicts would be inappropriate because a directed verdict indicates that the court decided the case as a matter of law and concluded that no factual determinations were necessary to resolve the case. *See* FED. R. CIV. P. 50 (allowing judgment as a matter of law when a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue). Directed verdicts are therefore more appropriately grouped with summary judgment motions, because the motions are decided on the same standard, just at a different point in the procedural progress of the case.

210. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1306 (2005).

211. For disposition code 9, judgment on court trial, almost 90% of the cases were actually disposed of by bench decisions, and the most significant wrongly included group was jury trials or directed verdicts. *Id.* For disposition codes 7 and 8, jury verdict and directed verdict, which were reported by Hadfield together, well over 90% were accurate, and again, non-trial adjudications were rarely wrongly included. *Id.*

212. *Id.* at 1307–11. Hadfield audited code 6, judgment on motion before trial; code 17, judgment on other; code 12, dismissed: voluntary; code 13, dismissed: settled; and code 14, dismissed: other. The only significant number of hidden trials Hadfield found were coded in disposition code "judgment: other," but even those were only significant for categories of cases where plaintiff and defendant were both organizations. *Id.* at 1308–09. For cases between individuals, there were no hidden bench trials, between individuals and organizations, somewhere between 2% and

use of these codes is therefore a reliable count of trials in FOIA cases and other civil cases.

In addition to the trial rate, it is important to compare the rate of motion adjudications between FOIA cases and other civil cases. Even if FOIA trials are significantly less frequent than trials in other civil cases, that fact would not necessarily indicate that courts are converting questions of law into questions of fact if, for instance, FOIA cases more often settled for some reason. Motion adjudications from 1979 to 2008 have consistently been categorized under the disposition code for "judgment on motion before trial."[213] This disposition code, also audited by Hadfield, although not as reliable as the trial codes, is still "reasonably reliable" as indicating that the cases were decided by contested motion prior to trial.[214]

The judgment on motion code nonetheless suffers from some limitations. It is not a code used solely to designate summary judgment dispositions. Rather, it includes all cases that were "disposed of by a final judgment based on a motion for judgment on the pleadings, as defined in [Federal Rule of Civil Procedure 12(c)]; a motion for summary judgment, as defined in [Federal Rule of Civil Procedure 56]; [or] any other contested motion which results in

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4.3% were hidden bench trials, and for organizational parties on both sides, 8.1% bench trials. *Id.* at 1308 tbl.8. As for dismissal codes and the code for judgment on motion before trial, Hadfield found that these codes either do not hide trials or hide only small numbers of them. *Id.* at 1307–11.

The only other codes that may be hiding trials are appeal affirmed and appeal denied from a decision of the magistrate judge, codes that were not introduced until 1991. FJC Database Codebook 1991, *supra* note 202. These codes, however, are highly ambiguous. First, these codes would include appeals from a magistrate judge's decisions on any basis, including both decisions on motion and decisions after trial. Hadfield, *supra* note 203, at 716. Second, in 1991 the codebook indicated only that these codes applied when the district court was functioning as an appellate body, but in 1996 clarified that the codes counted only appeals from magistrate decisions. FJC Database Codebook 1991, *supra* note 202. It is unclear if, between 1991 and 1996 it also counted appeals from administrative decisions. Hadfield, *supra* note 203, at 716 n.12. Thus, inclusion of appeals from magistrate judge rulings may over-count trials and failure to include them may under-count trials. *Id.* Although this may be very significant for longitudinal studies about the trial rate, it is not a concern here. *See id.* at 715 (reporting data that tends to illustrate appeals from magistrate judges may explain some of the "disappearing" court trials). I omit these fields so as to be cautious about over-counting trials, but I do so consistently for FOIA cases and other civil cases. Accordingly, the under-counting, if it is present, is the same for both groups of interest.

213. Judgment on motion before trial is disposition code 6.

214. Hadfield, *supra* note 210, at 1307. Although disposition code 6 does not hide cases mistakenly coded as trials, it does hide a fair number of settlements, nonfinal judgments, and default judgments. *Id.* at 1307–08. This code is still far more reliable than codes purporting to represent voluntary dismissals or settlements and thus is the best of the available test to determine whether judges are converting questions of fact into questions of law in FOIA cases. *See generally* Hadfield, *supra* note 203, at 723–28 (describing comparatively high accuracy in the codes for trials and motions).

disposition before trial."[215] That last category most likely consists primarily of motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[216] Although this Article focuses on summary judgment resolution of FOIA cases, the inclusion of motions to dismiss for failure to state a claim and motions for judgment on the pleadings does not preclude use of the data. All three motions included within the disposition code are judgments as a matter of law based on a test of the elements of the claims and defenses at issue, and any such disposition is precluded if the court determines that there are genuine issues of material fact. These dispositions are the products of adversarial processes, rather than dispositions that arise from settlement or the failure of one party to meet a procedural requirement. Thus, although the disposition code for motions cannot be used to represent absolute numbers of summary judgment motion dispositions, the code can at least provide

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215. TRAINING & SUPPORT DIV., ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 206, at 3:19. This disposition code also includes "any order dismissing a prisoner petition," a designation that would not bear on the statistics used in this Article because prisoner litigation has been removed from the database for other reasons described above. Hadfield, *supra*, note 203; *see also* Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 580 (2004) (describing limitations of disposition code 6 with respect to measuring summary judgment dispositions).

216. There is ambiguity as to what dispositions fall within "any other contested motion which results in disposition before trial." Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 611 n.83 (2004). The structure of the CIVIL STATISTICAL REPORTING GUIDE's dispositions guidance to clerks' offices, however, breaks down types of dispositions into broad categories that provide insight into the use of the motions code. *See* TRAINING & SUPPORT DIV., ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 206, at 3:19. One category heading is for "dismissals," which includes several dismissal codes tending to encompass various types of procedural dismissals and a final code for "any other dismissal not covered by the preceding categories." *See id.* (listing categories including dismissal for want of prosecution, dismissal for lack of subject matter or personal jurisdiction, voluntary dismissal, and dismissal after settlement). A separate category heading for judgments lists those types of dispositions that generally concern the merits and would usually have prejudicial effect, including dispositions by trial, default judgments, consent judgments, and judgments by an arbitrator. *Id.* It is in this judgments category that disposition code 6 is explained as quoted in the text above. Accordingly, Rule 12(b)(6) motions, a determination typically considered to be on the merits, are most likely properly classified in the "motion before trial" code in the judgments section rather than the "other dismissals" code listed in the dismissals category. Moreover, other types of dismissals, including some other Rule 12(b) dismissals, are specifically enumerated in the dismissals category, making Rule 12(b)(6) motions the most likely type of motion to be included in the "any other contested motion" clause of the motions category. *Id.* Other researchers have also concluded that Rule 12(b)(6) motions are most likely included within the judgment on motion before trial disposition code 6. *See* Burbank, *supra*, at 610–11 & n.83 (noting that the Civil Statutory Reporting Guide suggests overlap and confusion between codes for "Dismissed Cases" and judgments on "Motions Before Trial").

a basis for a relative comparison between categories of cases. At a minimum, the data bears directly on the question of the rate at which FOIA cases are disposed as a matter of law rather than by trial, and I use the data recognizing this limitation.

Given that the category I compare to the trial rate encompasses all motion adjudication of cases, I have added into this category all cases decided on directed verdict because the standard for a directed verdict mirrors the summary judgment standard.[217] As such, to get an accurate sense of the number of cases decided by a court as a matter of law, judgment on motion and directed verdict cases are treated as one.[218]

2. FOIA dispositions over thirty years

Determining how many FOIA trials are taking place is straightforward. Compiled from the 1979 to 2008 databases, the table below indicates the number of FOIA cases disposed of each year, the number of FOIA cases disposed of by trial each year, and the percentage of FOIA dispositions that were by trial.

Year	*Number of FOIA Cases Terminated*	*Number of FOIA Trials*	*Percent of FOIA Cases Disposed of by Trial*
1979	457	6	1.31%
1980	558	10	1.79%
1981	530	14	2.64%
1982	450	11	2.44%
1983	429	5	1.17%
1984	466	4	0.86%
1985	573	5	0.87%
1986	567	5	0.88%
1987	453	3	0.66%
1988	397	4	1.01%
1989	354	1	0.28%
1990	327	1	0.31%
1991	341	2	0.59%

217. *Compare* FED. R. CIV. P. 50 (stating the standard for Rule 50 is "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"), *with* FED. R. CIV. P. 56 (stating the standard as "no genuine issue as to any material fact").

218. That is, I have combined disposition codes 6 and 8 into one motion decision category.

1992	500	3	0.60%
1993	464	3	0.65%
1994	485	4	0.82%
1995	508	0	0.00%
1996	448	2	0.45%
1997	410	1	0.24%
1998	415	0	0.00%
1999	364	0	0.00%
2000	339	0	0.00%
2001	348	0	0.00%
2002	277	0	0.00%
2003	262	2	0.76%
2004	300	0	0.00%
2005	410	0	0.00%
2006	315	0	0.00%
2007	302	1	0.33%
2008	295	1	0.34%
Total	**12,344**	**88**	**0.71%**

Of the eighty-eight trials reported among cases labeled as FOIA cases, eighty-six were bench trials and two were jury trials.[219] Because litigants in FOIA cases have no right to a jury trial,[220] the two jury trials reported likely represent error. Nonetheless, I have included those two reported jury trials in the total trial figure for the purpose of comparing these overall trial rates to the trial rates in civil cases generally, as I discuss below. There is no reason to believe that the error rates in disposition data for FOIA cases differ meaningfully from the error rates in disposition data for civil cases generally. If I were to correct for known error in the FOIA cases[221] but not in the broader category of civil cases, the comparison between the two groups would be less accurate. The overall trial rate among FOIA cases in thirty years of reported data makes clear that there are, in fact, extremely few trials. In recent years, it is fair to say there have

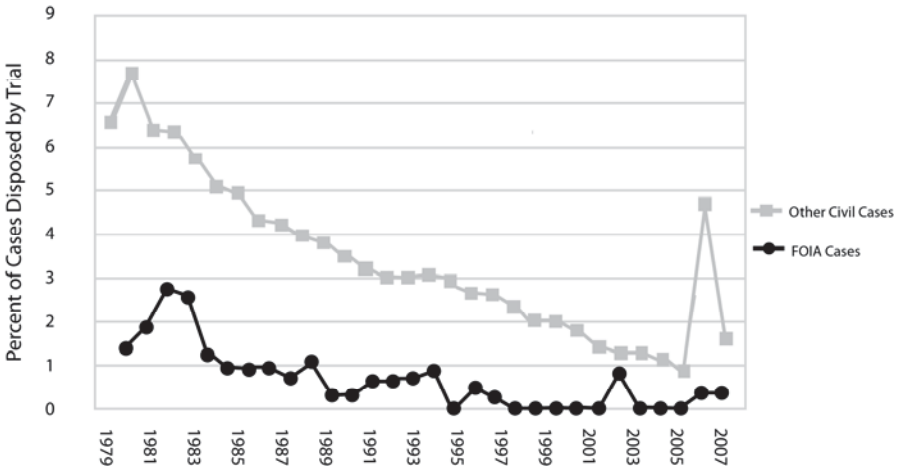
219. FJC Database, *supra* note 59.

220. *See* Lehman v. Nakshian, 453 U.S. 156, 169 (1981) (holding that sovereign immunity dictates that the Seventh Amendment does not apply to claims against United States); *see also* 5 U.S.C. § 552 (2006) (lack of statutory provision for jury trial).

221. The known errors are not limited to the two jury trial cases. As I discuss below, an examination of the PACER records reveals some error in FOIA trial reporting that would lower the FOIA trial rate even further. *See infra* Part IV.A (discussing records from particular FOIA cases coded as disposed by trial verdict).

been essentially no FOIA trials.[222]

The relevant inquiry, however, does not end with FOIA cases. Even though FOIA trials are rare and have decreased significantly over time, the same might be said for civil trials generally.[223] I thus conducted a comparison of the statistical differences between the rates of trials in FOIA cases and the rates of trials in other civil cases. Below is a plot of the percentage of FOIA cases disposed of by trial and the percentage of other civil cases disposed of by trial from 1979 to 2008.



This chart shows a difference in the trial rate between the two groups that is statistically significant both over the thirty-year period as a whole and for each individual year. Therefore, we can be statistically confident that the difference between these trial rates is meaningful and not the product of chance.[224]

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222. The data shows that from 1995 on, the number of trials hovers just above, or at, zero. FJC Database 1979–2008, *supra* note 59. Using data from 1995 to 2008, a regression of the percent of FOIA cases disposed of by trial over time reveals a line that has a slope that is not statistically different from zero, meaning the trial rate is not significantly increasing or decreasing over that time. Specifically, the coefficient is .007 with a 95% confidence interval from -.028 to .042. That is, the confidence interval includes the value zero, the coefficient (slope of the best-fit line) is not statistically different from zero (a flat line).

223. *See* Burbank, *supra* note 215, at 578 (discussing the difficulty in assessing the reasons for the so-called "vanishing" trial).

224. Statistical significance was measured using a proportions test. Although the data on FOIA trials appears to represent a population (i.e., all data rather than a sample of a larger set of data), which would eliminate the need for a significance test,

The significant downward trend in both civil trials generally and FOIA trials specifically deserves a short detour, if only because the trend is so noticeable. The phenomenon of the "disappearing trial" in civil litigation and its causes has been hotly debated.[225] For the purposes of this Article, although the trend is noticeable, it is not important. This Article is concerned with the difference between the rate at which FOIA cases go to trial and the rate at which other civil cases go to trial. A regression test reveals that for the first ten years of data, FOIA trials fell at roughly the same rate as the overall trial rate fell.[226] The rate at which FOIA trials fell changed only when the FOIA trial rate essentially bottomed out, hovering just over zero, with no further distance to fall.[227] Given that trial rates in both groups have fallen similarly, the trend indicates that the various factors that have affected how many cases get to trial generally has affected both rates

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it is not a true population because FOIA cases will continue to be adjudicated in federal court in the future, and thus, the past FOIA adjudications remain a subset of all FOIA adjudications. The category of other civil cases is a subset insofar as it does not include future cases and also because it does not include cases prior to 1979. Accordingly, a measure of statistical significance is still a meaningful test. For the overall rates over thirty years, the statistical significance of the difference is probable to a 1% confidence level, meaning there is a greater than 99% chance that the difference between the trial rates in FOIA cases and other civil cases is not the product of random chance. With regard to the proportions test for each year individually, the difference between the rates of FOIA trials and of other civil trials is statistically significant to at least a 5% confidence level (that is, there is a greater than 95% chance the difference is not the product of chance) and many to a 1% confidence level (with the exception of 2003, which is significant only to a 15% confidence level).

225. *See, e.g.*, Cecil et al., *supra* note 203 (considering settlement as a reason for vanishing trials); Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 1 J. EMPIRICAL LEGAL STUD. 111 (2009) (same); Hadfield, *supra* note 203 (considering data collection reasons for vanishing trials).

226. These rates were measured using a regression analysis. For the full thirty-year data set, a regression of the other civil trial rate over time produces a line with the coefficient (slope) of -.172, which indicates that the trial rate in non-FOIA civil cases has fallen by an average of about 0.17% per year over the thirty years. As measured by a t-statistic, this result is significant to a 95% confidence level with a confidence interval ranging from -.208 to -.136, meaning that we can be 95% certain that the true slope of the line falls between those coefficients. A regression of the FOIA trial rate from 1979 to 1989 produces a line with the coefficient -.152 with a 95% confidence interval ranging from -.274 to -.029. These rates are very similar and have highly overlapping confidence intervals. Like the FOIA trial rates, however, if the time period for the other civil trial rate is broken into two, it becomes clear that the rate fell faster in the earlier, rather than the later, years. This trend is also the natural result of the civil trial rate becoming so low that it had very little room left to fall in the past decade or two. In any case, the trend is similar between the two groups.

227. Data for the 1990 to 2008 period have a slightly downward sloping best-fit regression line, as a regression of FOIA trials over this period of time produces a coefficient (slope) of -.022. The 95% confidence interval ranges from -.046 to .002, which includes zero (a flat line). The regression line is therefore not statistically different from a flat line hovering above zero.

in the same way, while the difference between them has remained fairly constant throughout. These generally applicable trends do not explain the difference in the rates of FOIA trials and other civil trials at all points in time over the thirty-year period.

Knowing that FOIA cases are *not* being adjudicated by trial, we must now look at how the cases are, in fact, adjudicated. In comparison with the low trial rate among FOIA cases, the rate of cases that reach judgment on motion before trial, which indicates adjudication as a matter of law, is very high. The combined figures from 1979 to 2008 reveal that out of 12,344 FOIA cases, 4702, or 38.09%, were disposed of by motion before trial.[228] That percentage may not sound significant until it is compared with other civil motion dispositions during the same thirty-year period. For other types of civil cases, only 12.08% were disposed of by motion.[229] Again, the difference between these two rates overall and for each year individually is statistically significant: there is a less than 0.1% chance that the difference is due to chance.[230] This chart summarizes the difference between FOIA cases' dispositions and other civil cases' dispositions over the thirty-year period:

1979–2008:

	Percent of Cases Disposed of by Motion	*Percent of Cases Disposed of by Trial*
FOIA Cases	38.09%	0.71%
Other Civil Cases	12.08%	3.44%

As discussed above, FOIA cases involve a variety of commonly occurring factual questions,[231] just like any typical civil matter. Yet, these cases are going to trial significantly less frequently than the already low trial rate in other civil cases and are decided on motion far more frequently than other civil cases. The numbers therefore support the conclusion that judges rarely, if ever, conclude that material factual disputes exist such that trials are necessary in FOIA

228. FJC Database 1979–2008, *supra* note 59.
229. *Id.* Out of 5,248,802 other civil cases, 634,148 were disposed of by motion. *Id.*
230. The statistical significance of the difference between the trial rates among FOIA cases and among other civil cases was also measured using a proportions test. In that test, the rates of individual years were compared and the difference between them was statistically significant to at least a 0.1% confidence level, meaning that there is less than a 0.1% chance that the difference is not significant. The difference between the overall rates was also significant to that level.
231. *See supra* Part II.B (describing the common factual questions under FOIA exemptions 5, 6, and 7).

cases, and judges very often find that all issues in the case can be resolved as a matter of law.

One additional piece of empirical evidence underscores the anomalous treatment of FOIA cases. The District Court for the District of Columbia is the forum for a disproportionate share of FOIA cases, disposing of 38% of all FOIA cases in the country, even though it disposes of only 1.3% of all district court litigation.[232] Accordingly, judges in that court are more familiar with FOIA litigation. FOIA litigators in the District of Columbia sense a routinization of these cases and some unwillingness to look at a case's factual disputes.[233] The numbers support exactly that conclusion. Although over the 1979 to 2008 period, 38% of all FOIA cases were disposed of in D.C. District Court, only 13% of reported FOIA trials occurred in that forum.[234] Put differently, 1% of FOIA cases were decided on trial in other parts of the country, but in D.C., only 0.25% were decided by trial.[235] The difference between those rates is statistically significant.[236] Judges outside of D.C., less familiar with FOIA and more used to traditional summary judgment application, are more likely to find a factual dispute.[237]

C. Standards of Appellate Review of Summary Judgment in FOIA Cases

Some circuits considering FOIA cases on appeal have departed from traditional practice concerning the appropriate standard of appellate review for cases decided on summary judgment. For the reasons explained below, this departure constitutes another strong indicator of courts' conversion of questions of fact into questions of law at the summary judgment stage in FOIA cases.[238]

In the normal course of events, an appellate court reviews summary

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232. FJC Database 1979–2008, *supra* note 59. The large proportion of cases filed in the District Court for the District of Columbia is likely explained in part by FOIA's venue provision, which allows the plaintiff to sue in the district court where she resides or has her principal place of business, in the district court where the agency records are located (often the District of Columbia), or in the District Court for the District of Columbia. 5 U.S.C. 552(a)(4)(B) (2006).

233. *See* Telephone Interview with Lucinda Sikes, Lecturer in Residence, Boalt Hall, Univ. of Cal. at Berkeley (Sept. 1, 2010) [hereinafter Sikes Interview].

234. FJC Database, *supra* note 59.

235. *Id.*

236. Using a proportions test, the difference between the trial rates is statistically significant to a 1% confidence level, meaning that we can be 99% certain that the difference is meaningful.

237. FJC Database, *supra* note 59.

238. *See* Petition for Writ of Certiorari at i, 5–6, Berger v. IRS, 129 S. Ct. 2789 (2009) (mem.) (No. 08-884), 2009 WL 99141, at *i, *5–6 (petitioning the Court to consider the question of what standard of review should be used to evaluate an appeal from a grant of summary judgment in a FOIA case).

judgment motion decisions de novo, deciding them in the first instance without any deference to the lower court's conclusions.[239] By definition, a grant of summary judgment can occur when judges are presented only with questions of law.[240] However, only six circuits apply a de novo standard of review to summary judgment decisions in FOIA cases: the D.C. Circuit,[241] First Circuit,[242] Second Circuit,[243] Sixth Circuit,[244] Eighth Circuit,[245] and the Tenth Circuit.[246] The Third, Fourth, Seventh, Ninth, and Eleventh Circuits all have a varying two-tiered standard of review. Of these, the Third,[247] Fourth,[248] Ninth,[249] and Eleventh,[250] review legal conclusions de novo and factual findings for clear error.[251] The Seventh Circuit has developed a two-tiered review in which it first determines if the district court had an adequate factual basis for its decision and then reviews the entire

239. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 465 n.10 (1992); *see also supra* Part III.A (describing summary judgment as it is uniquely applied to FOIA cases).

240. FED. R. CIV. P. 56(a); *see* Silver, *supra* note 189, at 736–40 (presenting a thorough analysis of the justifications for using de novo review specifically as to FOIA summary judgment decisions).

241. Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 57 (D.C. Cir. 2003); Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 32 (D.C. Cir. 2002).

242. Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 228 (1st Cir. 1994).

243. Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 69 (2d Cir. 2009).

244. Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1078 (6th Cir. 1998).

245. Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1209 (8th Cir. 2008).

246. Forest Guardians v. U.S. Dep't of the Interior, 416 F.3d 1173, 1177 (10th Cir. 2005). *But see* Casad v. U.S. Dep't of Health & Human Servs., 301 F.3d 1247, 1251 (10th Cir. 2002) ("On appeal, the initial inquiry is whether the district court had an adequate factual basis on which to base its decision. Assuming this prerequisite is met, in a summary judgment case such as this one, we next 'review de novo the district court's legal conclusions that the requested materials are covered by the relevant FOIA exemptions.'" (citations omitted)). Even *Casad*'s articulation, however, is actually a de novo standard; it just assures that, as a matter of law, there has been adequate factual development prior to a ruling that there are no genuine issues of fact.

247. McDonnell v. United States, 4 F.3d 1227, 1242 (3d Cir. 1993).

248. Hunton & Williams v. U.S. Dep't of Justice, 590 F.3d 272, 275–76 (4th Cir. 2010).

249. Lane v. Dep't of the Interior, 523 F.3d 1128, 1135 (9th Cir. 2008).

250. News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1189 (11th Cir. 2007).

251. The Third, Ninth, and Eleventh Circuits also have a preliminary step of reviewing the district court's decision to make sure there was adequate factual development of the record. *Lane*, 523 F.3d at 1135; *News-Press*, 489 F.3d at 1189; *McDonnell*, 4 F.3d at 1242. This standard of review is not often articulated in typical summary judgment proceedings, but actually does not depart from the general rule that summary judgment should not be granted if the nonmoving party has not had adequate opportunity to discover relevant facts. *See* FED. R. CIV. P. 56(d), 28 U.S.C. app. r. 56(d) (Supp. III 2010) (amended 2010).

decision under the clear error standard.[252] The Fifth Circuit has declined to weigh in on the debate.[253]

That five circuits have mandated a two-tiered standard of review in FOIA cases decided on summary judgment under which they review district courts' factual findings under the clearly erroneous standard indicates that the district courts are routinely engaging in fact-finding at the summary judgment stage in FOIA cases. The Ninth Circuit explained:

> At first glance this standard seems anomalous. It can best be explained by reflecting upon the task confronting the district court in a FOIA case. It must examine the requested document (usually *in camera*, to avoid the risk of premature disclosure) to determine whether it falls within any of FOIA's statutory exemptions from disclosure. Because there will rarely be any genuine issues of material fact—the document says whatever it says—the case may usually be decided on summary judgment. Even so, the proceeding might better be described as a trial on a hidden record, where the district court's characterization of the requested document more closely resembles a finding of fact than a conclusion of law. Of course, we grant substantial deference to a district court's fact finding.[254]

Other circuits employing the two-tiered standard likewise acknowledge the factual nature of the district court's task when confronted with summary judgment motions in a FOIA case. The Eleventh Circuit, for instance, has noted that the clearly erroneous standard is applicable where "there was a factual dispute between the parties as to the very nature of the withheld documents, and thus as to whether they even fell within the applicable exemption."[255] Even the D.C. Circuit, which employs de novo review, has recognized that "[w]hen the district court reviews an agency's *Vaughn* index to verify the validity of each claimed exemption, its determination resembles a fact-finding process."[256] Acknowledging this oddity, the court

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252. *See* Enviro Tech Int'l, Inc. v. EPA, 371 F.3d 370, 373–74 (7th Cir. 2004) ("We have acknowledged that use of the clearly erroneous standard is in tension with the de novo standard that normally governs our review of summary judgment decisions. We have also recognized that the courts of appeals are divided as to the appropriate standard of review in FOIA cases decided by way of summary judgment. Indeed our own case law is not entirely consistent on this point. Review for clear error remains the norm for FOIA cases in this circuit." (citations omitted)).

253. FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 610–11 & n.2 (5th Cir. 2003) (per curiam).

254. Assembly of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 919 (9th Cir. 1992).

255. *News-Press*, 489 F.3d at 1187–88 (emphases removed).

256. Summers v. Dep't of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998).

explained that, "due to the peculiar nature of the FOIA, we have created exceptions to the normal summary judgment review processes."[257]

Thus, although district courts are almost universally deciding FOIA cases on motions for summary judgment, the courts of appeals are applying differing standards of review depending on the factual or legal nature of the question on review. The only conclusion one can draw from a standard of review that bifurcates review of factual questions and review of legal questions is that district courts are routinely using summary judgment to decide questions of fact in FOIA cases.

IV. THE UNTAPPED POTENTIAL OF FOIA TRIALS

As the previous Part demonstrated, summary judgment in FOIA cases has become a vehicle for fact-finding rather than a means of resolving only cases with no genuine factual disputes.[258] This conversion of the summary judgment procedure in FOIA cases has resulted in an almost complete disappearance of the FOIA trial from the federal judicial docket.[259] The remaining question is whether the lack of FOIA trials matters. Is it even possible to have trials in these types of cases? Even if FOIA cases went to trial, those trials would be bench trials, not jury trials; a judge would therefore engage in fact-finding either way. Moreover, by reviewing factual findings for clear error, half of the courts of appeals are treating district court summary judgment orders in the same manner they would treat review of a bench trial order on appeal. How would a FOIA trial work, and would plaintiffs benefit from having a trial in a FOIA case? If there are benefits, do they outweigh the cost of having more trials? In other words, is the absence of the FOIA trial meaningful? This Part examines those questions.

A. Empirical Evidence

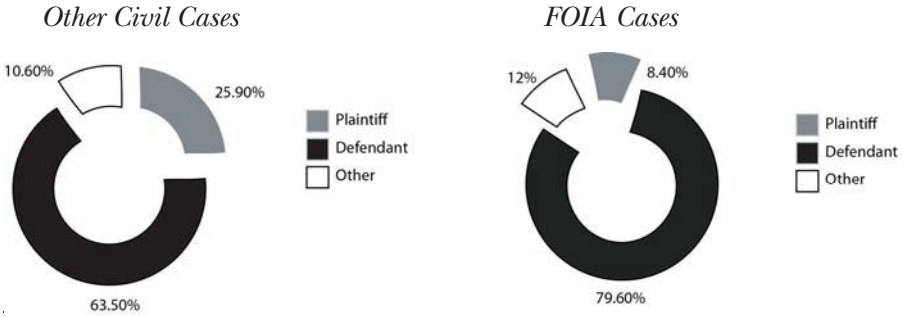
Data is a useful starting point in assessing whether FOIA litigants might achieve greater success if the traditional summary judgment standard were applied in FOIA cases, resulting in more of those cases going to trial. The FJC Database records which party prevailed in a given lawsuit. That data, combined with the data on case adjudication methods, sheds some light on how FOIA plaintiffs fare

257. *Id.*
258. *See supra* Part III.
259. *See supra* Part III.B.

when a case is resolved by summary judgment versus a trial.[260]

Normally, one would expect defendants to prevail far more frequently than plaintiffs on summary judgment motions because defendants do not bear the burden of proof at trial and therefore have a lower standard at summary judgment.[261] The FJC data reflect this result. In non-FOIA civil cases, defendants prevail in cases decided on motions before trial 63.5% of the time, and plaintiffs prevail only 25.9% of the time.[262] In FOIA cases, however, one would expect the opposite—that plaintiffs should prevail far more frequently than defendants on summary judgment motions because the government bears the burden of proof on the merits.[263] However, the data represented in the following charts show that nothing could be further from the truth. In FOIA cases decided on pretrial motion, defendants prevail at even higher rates—a full 79.6% of the time in comparison with plaintiffs' 8.4% rate.[264]

Prevailing Party in Motions Dispositions:



260. FJC Database, *supra* note 59.

261. *See* Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1043–44 (1989).

262. FJC Database, *supra* note 59. Prevailing, in this instance, is measured by the "judgment for" field of the FJC Database, which has consistently been reported since 1979. *See* FJC Database Codebooks, *supra* note 202. The codes under this field report judgment for plaintiff, for defendant, for both, unknown, and unreported. I use only the judgment for plaintiff and for defendant codes to represent the parties' relative likelihoods for success. Although, overall, there are vast numbers of cases either unreported or unknown, there are only 10% to 12% of cases that are unreported and unknown when examining only the judgment on motion and judgment on trial categories. FJC Database, *supra* note 59.

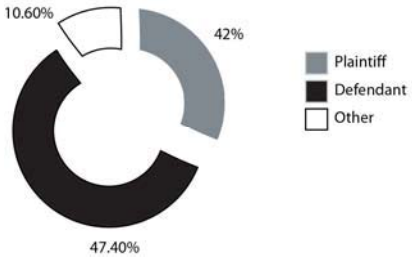
263. *See* 5 U.S.C. § 552(a)(4)(B) (2006) ("[T]he burden is on the agency to sustain its action [to withhold agency records].").

264. FJC Database, *supra* note 59. Even comparing plaintiffs' prevailing rate, the difference between this rate in motions dispositions in FOIA cases and in other civil cases is significant to a 1% confidence level, indicating that we can be at least 99% certain the difference is significant. Taking account of the burdens of proof, the difference between the prevailing rate of plaintiffs in FOIA cases decided by motion and defendants in other civil litigation is even greater and significant to an even higher confidence level.

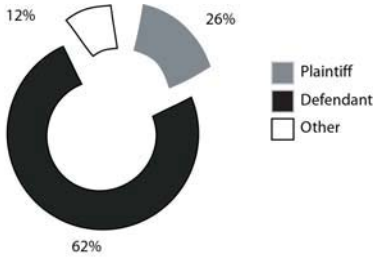
Meanwhile, at trial, plaintiffs in non-FOIA civil cases prevail 42% of the time, while defendants prevail 47.4% of the time.[265] In FOIA cases, though an opposite trend should be expected, the trend is similar to other civil cases: plaintiffs' chances of prevailing at trial increase to 26%, whereas defendants prevail 62% of the time at trial.[266]

Prevailing Party in Trial Dispositions:

Other Civil Cases



FOIA Cases



The data therefore indicate that FOIA plaintiffs are faring very poorly when their cases are decided as a matter of law by motion and are doing significantly better when their cases go to trial. The data also indicate that although one would expect the government, by bearing the burden of proof in FOIA cases, to fare worse on motion and better at trial, it is actually doing better at the motion stage in FOIA cases than defendants in other civil cases.

These numbers, however, should be viewed with some caution. The small number of FOIA cases that have gone to trial itself cautions against placing too much weight on these data.[267] In addition, this

265. *Id.*

266. *Id.* Again, even comparing plaintiffs' prevailing rate, the difference between this rate at trial in FOIA cases and in other civil cases is significant to a 1% confidence level, indicating that we can be at least 99% certain the difference is significant. Furthermore, accounting for the burdens of proof, the difference is even greater between the prevailing rate of plaintiffs in FOIA cases that are tried and of defendants in other civil litigation that are tried and is significant to an even higher confidence level.

267. Despite the small numbers, the difference between plaintiff success rates in FOIA cases decided by motion and FOIA cases decided by trial is statistically significant to a 99% confidence level. *Id.* Likewise, the difference between plaintiff success rates on summary judgment motion in FOIA cases and in other cases and the difference between plaintiff success rates on trial in FOIA cases and other cases are both statistically significant to a 99% confidence level. *Id.* Nonetheless, the oddities of FOIA trials uncovered through research for this Article and the nonexistence of

analysis shows a correlation between trials and better outcomes for FOIA plaintiffs, but it in no way sheds light on actual causation. In other words, particularly with this small set of data and the many variables that can affect the outcome of a case, the FJC Database cannot provide a basis for showing that the near exclusivity of summary judgment is, by itself, causing plaintiffs to have a low likelihood of prevailing in a FOIA case. Regardless of the limitations, however, the correlation between higher success and trial adjudication—particularly in light of the failure of that success to align with our expectations based on the success of the party who does not bear the burden of proof in other civil litigation—provides some reason to believe that summary judgment fails to afford FOIA plaintiffs a full opportunity to litigate their cases.

B. Past FOIA Trials: Learning from Records and Attorney Interviews

The hypothesis that summary judgment may disadvantage FOIA plaintiffs is supported by a comparison between the procedures available to FOIA litigants at the summary judgment stage and at trial. The unique nature of summary judgment processes in FOIA cases, discussed in detail in Part III,[268] has often been attributed to the information imbalance between the government and the requester.[269] Special summary judgment procedures in FOIA cases have attempted to correct for the information imbalance between the parties, including the use of the *Vaughn* index and in camera review of the records themselves.[270] Discovery in FOIA cases is disfavored,[271] and as a result, the requester typically can only challenge the adequacy of the government's *Vaughn* index, not the veracity of the statements it contains.[272] The resolution of factual questions in a forum where the plaintiff cannot effectively challenge the assertions in the

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those trials recently cautions against placing too much weight on these statistical results.

268. *See supra* Part III.A.

269. *See* Silver, *supra* note 189, at 743. Interestingly, while the D.C. Circuit has asserted (with little support) that the "vast majority of FOIA cases can be resolved on summary judgment," it recently held out the ephemeral possibility of a FOIA trial as a basis for concluding that a requester was not entitled to an attorneys' fees award in cases where the government produced the records before adjudication of the claim on the merits but in which the government would have won at summary judgment. Brayton v. Office of the U.S. Trade Representative, 641 F.3d 521, 522, 527–28 (D.C. Cir. 2011).

270. *See supra* Part III.A.

271. *See* Judicial Watch, Inc. v. U.S. Dep't of Justice, 185 F. Supp. 2d 54, 65 (D.D.C. 2002).

272. *See, e.g.*, Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 30–31 (D.C. Cir. 1998) (challenging the adequacy of agency affidavits).

government's affidavits and other evidence is made even less favorable to the plaintiff because of many courts' acknowledged deference to the government's position. As one court said in analyzing a claim under exemption 5, "[t]here should be considerable deference to the Commission's judgment as to what constitutes, as our Court of Appeals has put it, 'part of the agency give-and-take—of the deliberative process—by which the decision itself is made.'"[273] Even where unacknowledged, there is an unquestionable tendency to accept the government's view of the facts when there is a dispute.[274] Yet, de novo review of agency withholdings is mandated by the statute and deference to the government's position is nowhere to be found.[275] Summary judgment, therefore, has severe limitations from the perspective of a FOIA plaintiff.[276]

Perhaps no procedure can completely overcome the disadvantage a plaintiff faces as a result of the information imbalance in FOIA cases.[277] Nonetheless, comparing summary judgment to what we know about how FOIA cases are tried can shed light on what seems to be a missed opportunity to even the playing field in FOIA litigation. A look at the records in those rare FOIA trials demonstrates both that FOIA trials are possible and that they are useful. In addition to looking at the dockets and records in FOIA cases that went to trial, I also interviewed some FOIA plaintiffs' attorneys who litigated a few of those rare FOIA trials, focusing on what they saw as the costs and benefits of trial adjudications.

1. Trial records

Although the vast majority of the eighty-eight FOIA trials identified in the FJC Database date back two decades or more, I was able to obtain court documents for a sufficient number to understand how

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273. Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975)).

274. *See, e.g.*, Access Reports v. Dep't of Justice, 926 F.2d 1192, 1197 (D.C. Cir. 1991).

275. The only statutory deference granted to the government in FOIA itself is deference to government affidavits concerning the government's technical capacity to reproduce certain records. *See* 5 U.S.C. § 552(a)(4)(B) (2006). Claims of withholding, reviewed de novo, do not get any official deference from the courts under FOIA. *See id.* ("In [a case to enjoin the agency from withholding agency records] the court shall determine the matter de novo . . . .").

276. *See* Burbank, *supra* note 216, at 592, 622 (commenting generally on the disappearing civil trial and maintaining that "even the most hard-hearted empiricist" should be persuaded that "some litigants in some types of cases in some courts are not receiving reasonable opportunities to present their cases"). Compared with other types of cases, the special procedures used in summary judgment in FOIA cases only decrease the ability of plaintiffs to present their cases.

277. *See* Silver, *supra* note 189, at 751.

these trials arose and how they were conducted. Examining the records showed that a significant number of those trials were not evidentiary trials on the merits of a FOIA claim. Some, but not all, of that discrepancy was due to reporting error.[278] Other trials were correctly reported, but the trials actually concerned a non-FOIA issue in each case, and the FOIA issue was resolved in another manner.[279] Additionally, some trials were actually brought under the Privacy Act.[280] Although many of the issues in Privacy Act cases are similar to those in FOIA cases, Privacy Act trials often have different and special considerations that make them less useful to analyze.[281] Although I was able to verify the nature of the proceedings for a significant portion of the eighty-eight reported trials, for many I was not able to locate a written decision of any sort that would identify the issues that were tried or other characteristics of the proceedings. Finally, I located the records in several trials that were not included in the FJC Database because they were outside the date range for which data is available. Despite limitations, the actual FOIA trials with sufficiently detailed written decisions and other records allow us to learn a great deal about how courts have treated these rare FOIA trials.

The issues most commonly tried in FOIA cases arose under exemption 4,[282] which permits withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[283] To properly invoke this exemption, the government is required to show that records contain either "trade secrets" or confidential commercial or financial information that

278. *E.g.*, Barnes v. Dep't of Army, No. 90-00390 (N.D. Ala. Sept. 4, 1990) (order granting summary judgment to defendant, although this case was coded as a trial).

279. *E.g.*, McAdams v. United States, No. 05-06331 (E.D. Pa. Mar. 27, 2006) (order referring matter to magistrate judge for bench trial on claim under Federal Tort Claims Act after FOIA claim had already been dismissed).

280. *See* cases cited *infra* note 281.

281. In each of the cases, the plaintiff was claiming damages, not simply injunctive relief as is available in a FOIA case. A damages determination is more likely to seem factual to a judge and therefore go to trial. *See* Dong v. Smithsonian Inst., 943 F. Supp. 69, 70 (D.D.C. 1996) (employee sued employer for damages resulting from failure to properly collect information under the Privacy Act); Thompson v. Dep't of Transp. U.S. Coast Guard, 547 F. Supp. 274, 276 (S.D. Fla. 1982) (employee sued employer for damages resulting from improper collection and maintenance of employee records); Johnson v. U.S. Dep't of the Air Force, 526 F. Supp. 679, 680 (W.D. Okla. 1980) (damages action against employer), *aff'd sub. nom.* Smith v. U.S. Dep't of Air Force, 703 F.2d 583 (1982); Calhoun v. Wells, No. 79-2337-2, 1980 WL 1637, at *1 (D.S.C. July 30, 1980) (taxpayer sued IRS for damages resulting from circulation of information about taxpayer to taxpayer's clients).

282. *See* HAMMITT ET AL., *supra* note 152, at 403 ("When a FOIA trial has occurred it was often in Exemption 4 cases where the issue is whether a document qualifies as a 'trade secret' or confidential commercial information.").

283. 5 U.S.C. § 552(b)(4) (2006).

came from a non-governmental person or business.[284] Most exemption 4 claims involve confidential commercial or financial information rather than trade secrets.[285] Although judicial interpretation has created a confusing, bifurcated standard for reviewing these claims,[286] for the purposes of this Article, it is most important that the exemption's applicability often turns on whether release of the records would cause substantial competitive injury to the person who submitted the information to the government (often a private business).[287] Competitive injury, in turn, requires the government or the submitter to establish that the submitter faces actual competition and demonstrate the likely consequences of disclosure.[288]

FOIA trials concerning exemption 4 focus on precisely these factual disputes.[289] Findings of fact made in these trials include the

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284. *Id.*

285. To conclude that a record contains a trade secret, the decision-maker must find that the information is actually kept secret, that it is commercially valuable, and that it is a "plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). In *Public Citizen*, the D.C. Circuit rejected the much broader definition of trade secrets found in the *Restatement of Torts*. *See id.* Even though only the Tenth Circuit has expressly adopted the *Public Citizen* test, it is nonetheless the prevailing view, as no other circuit has adopted any other test. *See* Anderson v. Dep't of Health & Human Servs., 907 F.2d 936, 943–44 (10th Cir. 1990) (adopting the *Public Citizen* test). In practice, because it is easier to show that records contain confidential commercial information than to show they contain trade secrets, the former is more often urged by the government or intervening business.

286. In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, the D.C. Circuit differentiated between information voluntarily provided to the government and submissions that were compulsory. 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc). In essence, if submissions are voluntary, the potential impairment of the government's ability to obtain records voluntarily in the future can be considered, whereas if a submission was compulsory, that factor does not come into play. *See id.* Regardless of the category, a record can be exempt from disclosure if its release would cause the submitter substantial competitive harm. *See* Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

287. *See Nat'l Parks & Conservation Ass'n*, 498 F.2d at 770–71.

288. Niagara Mohawk Power Corp. v. U.S. Dep't of Energy, 169 F.3d 16, 18 (D.C. Cir. 1999).

289. I placed seven trials in this category. In Def. of Animals v. U.S. Dep't of Agric., 656 F. Supp. 2d 68, 70 (D.D.C. 2009); Cohen, Dunn & Sinclair, P.C. v. Gen. Servs. Admin., No. 92-57-A, 1992 U.S. Dist. LEXIS 21730, at *18–20 (E.D. Va. Sept. 10, 1992); Morrison-Knudsen Co. v. Dep't of the Army, 595 F. Supp. 352, 353, 356 (D.D.C. 1984); J.H. Lawrence Co. v. Smith, 545 F. Supp. 421, 423–24 (D. Md. 1982); Doherty v. FTC, No. 80-0513, 1981 U.S. Dist. LEXIS 13262, at *2 (D.D.C. June 24, 1981); Braintree Elec. Light Dep't v. Dep't of Energy, 494 F. Supp. 287, 290 (D.D.C. 1980); Green v. Dep't of Commerce, 468 F. Supp. 691, 693–94 (D.D.C. 1979). One additional case may qualify. *See* Glacier Park Found. v. Andrus, 506 F. Supp. 637, 641 (D. Mont. 1981) (cursorily denying motions for summary judgment on a FOIA issue that was distinct from the main disputes in the case), *rev'd on other grounds sub nom.* Glacier Park Found. v. Watt, 663 F.2d 882 (9th Cir. 1982).

following statements:

> The defendant has failed to show by a preponderance of the evidence that disclosure of each piece of information will cause substantial harm to the competitive position of the person submitting the report. All of the witnesses conceded that some of the information was not genuinely confidential; it might be either out of date, or already known to competitors, or concern a proposed transaction which was never consummated. Publication of such information could not conceivably harm the competitive position of the submitter.[290]

> The distributors and dealers who contributed information to the List are free to disseminate the information to competitors of [the business submitter], however it is industry practice to keep this information confidential. . . . The present heat pump market is found to be highly competitive. . . . The list is maintained confidentially in a locked cabinet with limited access.[291]

> Disclosure of the information at issue would allow a sophisticated competitor to deduce technical information concerning anticipated (but unannounced) network configuration, capabilities and performance of [the business submitter]. . . . From the detailed prices for access, a competitor could tell [the business submitter's] current method of providing access and future plans to change this method, as well as its plans of increasing its "points and presence" (the closet point of entry onto the network).[292]

These examples demonstrate the most typical kinds of factual findings in those rare FOIA cases that make it to trial. In effect, these findings concern the classic factual determinations involved in an exemption 4 case concerning the historical fact inquiry into whether the record is actually kept confidential and the predictive fact inquiry into whether the release of the record will cause injury in the competitive marketplace.

Another notable feature of exemption 4 cases is that the business submitter is often a party to the litigation—either as an intervenor-defendant in a FOIA case brought by a requester, or as a plaintiff in a reverse-FOIA case, where the submitter seeks to prevent disclosure by the government under FOIA.[293] Even when the business submitter is

290. *Green*, 468 F. Supp. at 694.
291. *Doherty*, 1981 U.S. Dist. LEXIS 13262 at *6.
292. *Cohen, Dunn & Sinclair, P.C.*, 1992 U.S. Dist. LEXIS 21730 at *19–20.
293. *See, e.g.*, *In Def. of Animals*, 656 F. Supp. 2d at 70 (business submitter intervened as defendant); *Cohen, Dunn & Sinclair, P.C.*, 1992 U.S. Dist. LEXIS 21730 at *2 (same); *J.H. Lawrence Co.*, 545 F. Supp. at 423 (same).

not a party, the submitter may provide expert testimony at trial.[294]

Interestingly, in at least three of the exemption 4 trials, the plaintiffs did not put on any witnesses of their own.[295] Rather than making an affirmative case, the plaintiffs in these cases chose to attack the sufficiency of the evidence put on by the defense and the credibility of the defense witnesses.[296]

However, not all of the FOIA trials for which records were available were exemption 4 cases. In one trial, the issue tried was "whether the court should issue a permanent mandatory injunction to compel the INS to process [the] FOIA requests [at issue] within the time allotted by statute."[297] The court took testimony and other evidence on the plaintiff's claim "that the Miami INS office has a pattern and practice of not responding to FOIA requests in the time period designated by [the statute]."[298] The court also admitted evidence regarding the government's claim that its large backlog of FOIA requests constituted "exceptional circumstances" under the statute, thereby relieving the agency from its duty to respond within the time period.[299]

In another tried case, the issues included whether the FOIA requests were processed in accordance with the law and whether the records fell under various FOIA exemptions, including exemption 7 covering some law enforcement records, exemption 5 covering the agency's deliberative process, and others.[300] The findings of fact included: "[s]ome of the documents sought . . . contain the

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294. *See Doherty*, 1981 U.S. Dist. LEXIS 13262 at *2–3 ("At trial, defendant presented one witness, Mr. Peter Alexander, who is the General Manager of Marketing of [the business submitter]. He was accepted as an expert witness by the Court in the area of heat pump marketing . . . ."); *Braintree Elec. Light Dep't*, 494 F. Supp. at 289 ("Mr. Frank W. Mills, sales manager for [the business submitter], testified persuasively about the company's business practices and the practices of its competitors.").

295. *See In Def. of Animals*, 656 F. Supp. 2d at 74; *Doherty*, 1981 U.S. Dist. LEXIS 13262 at *3; *Green*, 468 F. Supp. at 693.

296. *See infra* note 313 and accompanying text (revealing one cost-saving strategy of plaintiffs is to rely on the ability to cross-examine the defendant's expert witness rather than use one's own expert witness).

297. Ray v. U.S. Dep't of Justice, 770 F. Supp. 1544, 1546 (S.D. Fla. 1990), *vacated on other grounds*, 908 F.2d 1549 (11th Cir. 1990), *rev'd*, 502 U.S. 164 (1991).

298. *Id.*

299. *Id.* at 1547 (internal quotation marks omitted).

300. Yon v. IRS, 671 F. Supp. 1344, 1347 (S.D. Fla. 1987). In addition to this case, the FJC Database contains another case recorded as a trial in which it is unclear whether actual evidentiary proceedings took place, although the judge issued findings of fact and conclusions of law. *See* Bernal v. IRS, No. C 79-1117, 1980 U.S. Dist. LEXIS 12134, at *2 (N.D. Cal. Mar. 31, 1980) (describing court findings "[a]fter an in camera review of the documents withheld by the Internal Revenue Service and at issue in this case"); *see also supra* Parts II.B.1, B.3 (discussing factual issues that arise under exemptions 5 and 7).

defendant's internal agency deliberations" and "[r]elease of any of the defendant's criminal investigation files at this time could reasonably be expected to interfere with enforcement proceedings."[301]

Although rare, the examples of FOIA cases that have gone to trial demonstrate an important point: it is possible to try a FOIA case. There is nothing about FOIA that makes it inherently unsusceptible to evidentiary proceedings, witness testimony, cross-examination, or credibility determinations. Courts have managed to conduct these proceedings to trial verdicts, issuing findings of fact and conclusions of law, just like bench trials in other civil cases.

2. Attorney interviews

Interviews with attorneys who conducted some of the rare FOIA trials provide insight as to the benefits that trials may confer on FOIA plaintiffs.[302] Overall, interviewees indicated that those benefits include the pre-trial right to discovery, the ability to cross-examine witnesses at the trial itself, and the ability to focus the judge's attention on the deficiencies of the government's case in a way not possible on written submissions. They also mention the opportunity to obtain more favorable settlements between the parties.

Eric Glitzenstein is the attorney who litigated *In Defense of Animals v. United States Department of Agriculture*,[303] an exemption 4 case in which the business submitter intervened.[304] He explained that pre-trial depositions of the defendants' experts convinced him that the defendants would be unable to meet their burden of proof.[305] As a result, he decided not to put on any experts of his own, but rather to rely at trial on cross-examination to demonstrate why the defendants could not meet the standard for confidential commercial information.[306] Glitzenstein also believed that his ability to cross-

301. *Yon*, 671 F. Supp. at 1346.

302. The set of attorneys interviewed is not randomized, nor was it designed to be so. Rather, I chose only to interview attorneys for requesters, as the costs and benefits of trial from the perspective of the requester was my focus of inquiry. Moreover, government attorneys are often severely constrained in discussing the cases they litigate. In addition, I contacted attorneys who represented plaintiffs whom I could identify as repeat FOIA litigators, such that they would have sufficient FOIA litigation experience to compare their trial experience with the more typical manner of resolving FOIA cases. The set of attorneys I contacted was also limited by my ability to locate, at a minimum, a docket sheet so as to identify counsel of record in a given case.

303. 656 F. Supp. 2d 68 (D.D.C. 2009).

304. *Id.* at 70.

305. Telephone Interview with Eric Glitzenstein, Partner, Meyer Glitzenstein & Crystal (June 30, 2010) [hereinafter Glitzenstein Interview].

306. *Id.*

examine the experts, to get the court's undivided attention, and to expose the weakness of the other party's expert testimony were the main factors in winning the case.[307]

Lucinda Sikes litigated *Public Citizen Health Research Group v. FDA*,[308] another exemption 4 case. She described the effect of the court's denial of cross-motions for summary judgment and order to proceed to trial: the government produced most or all of the requested records.[309] She believed that the government realized its own inability to meet its burden of proof at trial and did not want to invest the resources as a result.[310] Alan Morrison, a long-time FOIA litigator, echoed Sikes's observation; he noted that in early FOIA cases, denials of summary judgment and the corresponding impending trials could prompt the parties to settle favorably to plaintiffs.[311] As such, it is not only the plaintiffs who feel the potential burden of conducting a trial; the government also feels that burden, producing an incentive to compromise. Compromise, in a FOIA case, necessarily involves the release of at least some of the requested records.

Interviewees, nonetheless, unanimously expressed concern over the cost of trying a FOIA case. Glitzenstein estimated that it took his firm hundreds of hours to prepare for trial, in comparison to the 50 or 100 hours it might take a seasoned litigator to write a summary judgment brief in a FOIA case.[312] He noted that the costs would escalate greatly if the plaintiff decided to use his own expert, rather than rely on cross-examination to point out the deficiencies in the defendants' witness testimony.[313] Sikes expressed the same initial reaction: going to trial is very burdensome for FOIA requesters.[314] Girardeau Spann, who litigated *Green v. Department of Commerce*,[315] said that he tried to avoid trial because of the cost in time and money.[316] Even aside from monetary costs, locating experts might be difficult for plaintiffs. Katherine Meyer, who litigated *Doherty v. FTC*,[317]

307. *Id.*
308. 953 F. Supp. 400 (D.D.C. 1996).
309. Sikes Interview, *supra* note 233.
310. *Id.*
311. Telephone Interview with Alan Morrison, Lerner Family Assoc. Dean for Pub. Interest & Pub. Serv. Law, George Washington Univ. Law Sch. (Sept. 3, 2010) [hereinafter Morrison Interview].
312. Glitzenstein Interview, *supra* note 305.
313. *Id.* Of course, if a case is tried, it is almost certain there will be summary judgment motions first. Accordingly, the costs of trial are cumulative to the costs of disposing of the case on motion.
314. Sikes Interview, *supra* note 233.
315. 468 F. Supp. 691 (D.D.C. 1979).
316. Telephone Interview with Girardeau Spann, Professor of Law, Georgetown Univ. Law Ctr. (Sept. 27, 2010) [hereinafter Spann Interview].
317. No. 80-0513, 1981 U.S. Dist. LEXIS 13262 (D.D.C. June 24, 1981).

recalled trying to find an expert for the trial in that case but said she was unable to do so.[318] Glitzenstein noted that in cases involving business interests, the business's resources are likely to exceed plaintiffs' resources at trial.[319]

Nonetheless, several interviewees felt that the costs of trial could be justified. Morrison opined that having a half-day trial with two or three witnesses is not a significant ordeal and can be faster for the parties and the court if the judge simply decides all of the issues.[320] He noted that a trial judgment also provides some immunization against reversal on appeal and thus lets the parties resolve the matter with more finality.[321] In three examined cases, the plaintiffs put no expert witness on at all, but relied on poking holes in the government's case through cross-examination; two of those plaintiffs prevailed.[322] In the third case, Meyer indicated that the law was very unfavorable to the plaintiffs.[323] As such, the burden on plaintiffs in trying FOIA cases with genuine factual disputes may not always be terribly high.

Some of that burden might also be lessened through the district court's discretionary power to fashion appropriate proceedings. In *Public Citizen Health Research Group*, the district court ordered limited proceedings, admitting the expert affidavits as direct examination and then allowing only cross examination at trial.[324] Although the case was resolved before trial, Sikes said she believed that preparing for trial would not have been as burdensome as it otherwise might have been because of the court's trial order fashioning limited proceedings.[325]

On balance, the failure of summary judgment to honestly resolve factual disputes and adequately allow a plaintiff to test the government's assertions weigh in favor of a more traditional application of summary judgment standards that, in turn, would result in more FOIA trials in appropriate cases. The ability to conduct discovery and cross-examine the government's witnesses cannot be replicated through the *Vaughn* index procedure or in

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318. Telephone Interview with Katherine Meyer, Partner, Meyer Glitzenstein & Crystal (Sept. 2, 2010) [hereinafter Meyer Interview].
319. Glitzenstein Interview, *supra* note 305.
320. Morrison Interview, *supra* note 311.
321. *Id.*
322. Glitzenstein Interview, *supra* note 305; Meyer Interview, *supra* note 318; Spann Interview, *supra* note 316.
323. Meyer Interview, *supra* note 318.
324. Pub. Citizen Health Research Grp. v. FDA, 953 F. Supp. 400, 406 (D.D.C. 1996).
325. Sikes Interview, *supra* note 233.

camera review. Litigators who have had the rare opportunity to use trial proceedings in a FOIA case confirm that cross-examination and discovery, combined with the ability to focus the court's undivided attention on key issues, can be powerful tools for plaintiffs.[326] The failure to recognize factual disputes in FOIA cases or simply to resolve them as a matter of law on summary judgment motions disserves FOIA litigants and hinders the public's access to government records.

CONCLUSION: LITIGATION STRATEGIES

Summary judgment can only be granted when there are no genuine issues of material fact.[327] Yet, although the most common FOIA disputes require the decision-maker to make factual findings of a historical or predictive nature,[328] FOIA cases are resolved almost invariably by motion, and FOIA trials are exceedingly rare in comparison with trials in other civil cases.[329] Moreover, the courts themselves acknowledge the routine resolution of factual disputes in FOIA cases at the summary judgment stage, both in their summary judgment decisions and in the appellate courts' anomalous review of so-called factual findings in FOIA cases decided by summary judgment.[330] Analyses of case outcomes and the costs and benefits of judicial procedures in summary judgment versus trial adjudication in FOIA cases indicate that in eliminating FOIA trials from the federal judicial docket, courts have undermined plaintiffs' ability to fully litigate their cases and thereby diminished access to public records.[331]

What, then, should be done? A natural inclination would be to conclude that courts should simply apply the summary judgment standard in a more honest and consistent way in FOIA cases.[332] Although a laudable goal, it will not happen unprompted. To work toward that goal, litigators should adopt tactics that encourage courts to think more critically about when summary judgment is the

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326. *Cf.* Robert P. Burns, *What Will We Lose If the Trial Vanishes?* 10 (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 11-48, 2011), *available at* http://ssrn.com/abstract=1851776 ("[C]ross-examination can serve to demonstrate that even the apparently chaste and 'factual' narratives of direct examination themselves have an element of willfulness about them, apparent in both the remaining characterizations that the witness chooses and the inevitable selectivity and ordering of the facts recounted.").

327. FED. R. CIV. P. 56(a).

328. *Supra* Part II.

329. *Supra* Part III.B.

330. *Supra* Parts III.A, C.

331. *Supra* Part IV.

332. *See, e.g.*, Silver, *supra* note 189, at 757 ("When there are genuine issues of material fact, the district court should make factual findings and determine the case after a trial—not on summary judgment.").

appropriate vehicle for resolving FOIA cases and when it is not.

First, FOIA plaintiffs should serve discovery requests on the agency defendant concerning every relevant fact issue in the case.[333] Although courts may believe discovery in FOIA cases is disfavored, not allowed, or limited to the *Vaughn* index, courts might be more willing to consider the possibility that discovery is appropriate in FOIA cases if more litigants request discovery. After all, no rule or statute prohibits discovery in a FOIA case or exempts FOIA cases from the normal discovery rules.[334] Thus, when discovery is denied, FOIA attorneys should litigate the denial of discovery and bring factual disputes to the court's attention.

Second, at the summary judgment stage, litigators should adopt a two-pronged strategy. Many FOIA cases are resolved on cross-motions for summary judgment, in which each party is arguing it is entitled to judgment as a matter of law. Frequently, plaintiffs do not argue in the alternative that even if they are not entitled to judgment as a matter of law, judgment for the government is precluded by a genuine issue of material fact.[335] Plaintiffs should make this alternative argument so that summary judgment is not presumed to be the appropriate vehicle for resolution by the parties as well as the courts. If a plaintiff obtains discovery, the facts in that discovery will provide a useful method for demonstrating a genuine issue for the alternative argument. If a plaintiff is denied discovery, the plaintiff should oppose the grant of summary judgment to the government and seek an opportunity to develop the record under Rule 56(d).[336] This strategy may highlight for the court why discovery was needed in the first place and cause the court to reconsider its position.

Finally, if a district court grants summary judgment to the

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333. *See supra* Part II.B (providing examples of such factual issues).

334. *See* 5 U.S.C. § 552 (2006) (failing to address discovery); FED. R. CIV. P. 26 (failing to address FOIA).

335. *E.g.*, Brief in Opposition to Government's Motion for Summary Judgment and in support of ACLU's Motion for Summary Judgment, ACLU v. Dep't of Defense, 406 F. Supp. 2d 330 (No. 04-4151) (S.D.N.Y. 2005), *available at* http://www.aclu.org/national-security/aclu-v-department-defense (arguing against the government's motion for summary judgment only by claiming ACLU's entitlement to summary judgment, and not, in the alternative, the existence of a genuine dispute of material fact for trial); Brief in Support of Public Citizen's Cross-Motion for Summary Judgment and in Opposition to USTR's Motion for Summary Judgment, Public Citizen Global Trade Watch v. Office of the U.S. Trade Representative, No. 01-00096 (D.D.C. Sept. 13, 2001) (same), *available at* http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=73.

336. *See* FED. R. CIV. P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.").

government in a case where the plaintiff believes there is a genuine issue of material fact, the plaintiff should argue on appeal not only that he or she—rather than the government—was entitled to summary judgment, but that judgment as a matter of law for the government was, in the alternative, precluded by factual disputes. Again, if discovery and an opportunity for evidentiary development under Rule 56(d) were denied, those issues should also be appealed.

As with other civil litigation, not every FOIA case involves a genuine dispute of material fact. When those factual disputes arise, however, plaintiffs' lawyers should not shy away from them, but should call those disputes to the courts' attention.[337] By reminding courts that FOIA cases can—and sometimes should—be tried, and by pressing courts to try appropriate FOIA cases, the goal of government transparency will be more fully realized.

337. That many, if not most, FOIA litigators do not have experience trying FOIA cases (or perhaps trying cases at all), is another obstacle. As Robert Burns has said of falling trial rates generally, the lack of trials means "[f]ewer 'litigators' are comfortable trying cases. This is, of course, a self-sustaining development." Burns, *supra* note 326, at 14. FOIA plaintiffs' attorneys should be aware of any personal aversion to trials they may have and lean against their inclination to avoid trying appropriate FOIA cases.